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## A Return to States' Rights Model: Amending the Constitution's Most Controversial and Misunderstood Provision

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## Article

### A Return to the States' Rights Model: Amending the Constitution's Most Controversial and Misunderstood Provision

MEG PENROSE

*This Article seeks to return to the intent of the Symposium, which was to stimulate a meaningful dialogue on the modern Second Amendment. More specifically, it proposes a return to the states' rights model that predated the Supreme Court's narrow decisions in District of Columbia v. Heller and McDonald v. City of Chicago by using the Article V process set forth directly in the Constitution to address modern concerns about firearms. The proposal flows from a healthy skepticism about the role of the federal government in interpreting gun regulations, as well as a desire to avoid the inevitable follow-up decisions from a very fractured and often unpredictable Supreme Court.*

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# A Return to the States' Rights Model: Amending the Constitution's Most Controversial and Misunderstood Provision

MEG PENROSE\*

*"A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution."*<sup>1</sup>

## I. INTRODUCTION: THE DILEMMA

The Second Amendment is a mere twenty-seven words, though most people only recognize the last fourteen of them: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>2</sup> What do these words, taken together, really mean? And do they mean something different today than they did in the eighteenth century when they were first written, debated, rewritten, and, ultimately, ratified? Can we, in the twenty-first century, rely solely on the text to ensure what the Second Amendment really protects?

Before embarking on what will undoubtedly be a controversial proposal, I want to be clear that this Article is not anti-gun, anti-military, anti-American, or anti-anything. Neither is the author, who is in the process of securing a concealed handgun license. This proposal does not call for any governmental agency to disarm any individual or group of individuals. Neither does the author. Rather, the proposal takes a look at recent Second Amendment jurisprudence with a healthy skepticism about the role of the federal government—and particularly the U.S. Supreme

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<sup>1</sup> William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696–97 (1976).

<sup>2</sup> U.S. CONST. amend II.

Court—in interpreting gun regulations. And, contrary to criticism that followed the Symposium, the proposal does not undermine constitutional integrity or sanctity. Instead, this proposal, which seeks a return to the states' rights model that predated the Supreme Court's narrow decisions in *District of Columbia v. Heller*<sup>3</sup> and *McDonald v. City of Chicago*,<sup>4</sup> uses the Article V process set forth directly in the Constitution to address modern concerns.<sup>5</sup>

The Founders knew that society would change in ways they could never have imagined. Thus, in their great design, they provided us with the means to change the Constitution in a manner that would enable this Constitution to outlive not only their grand vision but, likely, all of us and our vision as well. The Article V process has been used on several occasions to provide us with twenty-seven amendments to the original Constitution.<sup>6</sup> And, interestingly enough, the Second Amendment itself is a product of the Article V process.<sup>7</sup>

To be clear, any desire by individuals or groups to amend our Constitution is not anti-American nor counter-culture. Rather, Article V solutions are being asserted by scholars and groups on both the left and right sides of the political spectrum. From the Goldwater Institute's call for utilizing Article V to secure a Balanced Budget Amendment,<sup>8</sup> to broader calls for holding a constitutional convention<sup>9</sup> (something this author opposes), Article V appears to be gaining traction—or at least attention—in our modern society.

Our federal system is broken and most Americans hold little faith in the executive, legislative, or judicial branches of government. Approval

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<sup>3</sup> 554 U.S. 570 (2008).

<sup>4</sup> 130 S. Ct. 3020 (2010).

<sup>5</sup> See U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . ."). Article V is the "Amendment" provision of the Constitution and affords modern generations the opportunity to update, correct, or otherwise alter our nearly 230-year-old Constitution.

<sup>6</sup> For a historical discussion of the Article V process and examples of its application, see generally S. DOC. No. 112-9, at 987–1001 (2013), available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2013/pdf/GPO-CONAN-2013.pdf>.

<sup>7</sup> See Rod Taylor, Note, *A New Look at Article V and the Bill of Rights*, 6 IND. L. REV. 699, 705–06 (1973) (discussing the reasons Article V was employed to amend the Bill of Rights).

<sup>8</sup> For various resources discussing the Goldwater Institute's proposal, see *Compact for a Balanced Budget*, GOLDWATER INST. (Nov. 20, 2013), <http://goldwaterinstitute.org/article/compact-balanced-budget>.

<sup>9</sup> See, e.g., Sanford Levinson, *What Are We to Do About Dysfunction? Reflections on Structural Constitutional Change and the Irrelevance of Clever Lawyering*, 94 B.U. L. REV. 1127, 1132–33 (2014) (contending that a constitutional convention is necessary, despite contrary arguments that judicial interpretations can safeguard evolving values).

ratings for these entities are nearing all-time lows.<sup>10</sup> With no prospect of solutions being produced by the federal government, the promise of Article V and use of the state convention model appears enticing. Our Constitution was intended to change and, in fact, it did change immediately upon ratification with the addition of a corresponding Bill of Rights. This great promise, of an enduring yet adaptive Constitution, allows us to engage in healthy debate about the rights we hold dear. We should seek ways to enshrine those rights more permanently in our Constitution, rather than wait for the fluctuating decisions of the Supreme Court to define a particular right's parameters.

Such robust debate was expected, if not encouraged, by the Founders. Unfortunately, modern society often chooses to forgo debate, choosing instead to use invectives and harassing communications to shut off uncomfortable conversations. This Symposium attempted to jump start the healthy debate by inviting scholars and participants to discuss, debate, and assess the modern Second Amendment. Unfortunately, immediately following this Symposium, many individuals either misunderstood the dialogue being shared or sought to advance a different agenda—one not interested in healthy debate or meaningful dialogue.

This Article seeks to return to the Symposium's intent, which was to stimulate a meaningful dialogue on the modern Second Amendment. Readers may disagree with the Article's thesis, which proposes a return to the states' rights model to avoid the inevitable follow-up decisions from a very fractured and sometimes unpredictable Supreme Court. This author takes the states' rights approach—one usually championed by many of the most ardent gun owners in this country.

Hopefully, patience with the thesis will enable readers to appreciate that this Article is neither anti-gun nor anti-Constitution. The author has most assuredly evolved since the Symposium and hopes that this Article will evidence her belief that states are in a far better position than the Supreme Court to delimit any restrictions placed on gun ownership or usage. The author fears that if matters are left to the Supreme Court, any future restrictions will be far more limiting and, even worse, nationalized, despite local democratic movements that prefer differing regulations. As a proud Texan, this Author believes that her state and all others are in far superior positions to assess their citizens' local needs than the U.S. Supreme Court. Others are, of course, free to disagree.

The Second Amendment is being used herein as a vehicle for discussing the broader issue of states' rights. Will we become a nation that has its most controversial and divisive issues decided at the state or

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<sup>10</sup> Jeffrey M. Jones, *Americans' Trust in Government Generally Down this Year*, GALLUP POL. (Sept. 26, 2013).

national level? If we push them onto the national stage, we risk losing those rights that may seem clear from the text of the Constitution, but nevertheless are subject to interpretation from nine unelected Justices. As Chief Justice Marshall admonished in *McCulloch v. Maryland*,<sup>11</sup> the Constitution provides but an outline of our rights, subject, always, to being construed by the Supreme Court:

A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a Constitution we are expounding.<sup>12</sup>

The Supreme Court, not the Constitution, established the concept of judicial review.<sup>13</sup> Nowhere in the Constitution is this power set forth in the text, but the power has been firmly retained by the Court since its pronouncement in 1803 that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>14</sup> Thus, as this Article unfolds, it can only be hoped that readers will appreciate the vantage point of the author: The Constitution will continue to be expounded by the Supreme Court. Without clear protections for a states' rights approach to gun ownership and rights, the Supreme Court will ultimately hold the final say regarding any particular regulation, state or federal.

Such interpretive delegation is not favored by this author, particularly in light of the very tenuous nature of recent gun cases. The Supreme Court did not declare that an individual right to "keep and bear arms" exists until

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<sup>11</sup> 17 U.S. (1 Wheat.) 316 (1819).

<sup>12</sup> *Id.* at 407.

<sup>13</sup> *Marbury v. Madison*, 5 U.S. 137 (1 Cranch) (1803).

<sup>14</sup> *Id.* at 177.

2008.<sup>15</sup> That conclusion, made in a narrowly divided 5–4 decision,<sup>16</sup> suggests continuing uncertainty in our Second Amendment jurisprudence. While some might be content to rest upon the nascent case law, this author prefers keeping the power of regulation at the state level where local democracy is far better suited to meet the unique needs of each local population. Undoubtedly, questions of gun regulation and ownership will continue to be defined. The current system, however, leaves the constitutionality of each regulation subject to Supreme Court review. An amendment that returns the power of regulation to the states would insulate them from potential overreaching by any particular Supreme Court.

For these reasons, this Author would like to see Article V used to return the issue of gun rights and regulations to the individual states. The proffered amendment, as set forth herein, insures the continuing viability of lawful gun ownership. The main alteration is that this proposal takes the power of judicial review regarding state regulations away from the Supreme Court. Each of us must place our trust somewhere. This author retains more trust in the local democracy of states' rights.

Scholars have called the Second Amendment “embarrassing,”<sup>17</sup> “ironic,”<sup>18</sup> and “radical,”<sup>19</sup> and have even noted the racist origins of gun control laws.<sup>20</sup> Most Americans will tell you that the “right of the people to keep and bear arms” means that they have the *constitutional* right to own a gun.<sup>21</sup> Such an understanding is incomplete, at best.<sup>22</sup> Moreover, that view is arguably divorced from the text and history of the Second Amendment.<sup>23</sup> One cannot possibly discuss the Second Amendment, what

<sup>15</sup> *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

<sup>16</sup> *Id.* at 572.

<sup>17</sup> Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). Professor Levinson's article remains the seminal scholarly piece on the Second Amendment. Most scholars and historians credit Professor Levinson's article with instigating the modern surfeit of Second Amendment scholarship. See Jill Lepore, *The Lost Amendment*, NEW YORKER (Apr. 19, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/04/the-second-amendment.html> (describing Levinson's article as “a plea for reasoned debate” and designating it as one of several catalysts of renewed Second Amendment discourse).

<sup>18</sup> Saul Cornell, *The Ironic Second Amendment*, 1 ALB. GOV'T L. REV. 292 (2008).

<sup>19</sup> Eugene Volokh, *The Radical Amendment*, WALL ST. J., May 10, 2002, at A10.

<sup>20</sup> Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17 (1995).

<sup>21</sup> 74% Think Americans Have Constitutional Right to Own a Gun, RASMUSSEN REP. (Jan. 9, 2013), [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/gun\\_control/74\\_think\\_americans\\_have\\_constitutional\\_right\\_to\\_own\\_a\\_gun](http://www.rasmussenreports.com/public_content/politics/current_events/gun_control/74_think_americans_have_constitutional_right_to_own_a_gun).

<sup>22</sup> Historian Robert H. Churchill explains that there was undoubtedly a right to keep arms during colonial times. That right, however, was directly connected to the duty of the “body politic” to remain prepared for armed militia duty. Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 141–42 (2007).

<sup>23</sup> *Id.* at 141–47. “In every colony of British North America, militia laws required that these militiamen provide their own arms unless they were too poor to do so. Taken together, probate inventories and extant militia returns and gun censuses demonstrate that most white men in American



it protects, or how to improve it without appreciating its origin.<sup>24</sup>

This Article will delve into the origins, text, and early case law interpreting the Second Amendment to demonstrate that our modern understanding of these twenty-seven words has ventured so far from the Founders' design that we must do something innovative to protect the rights we hold so dear. We must, through the Article V amendment process, excise the first thirteen words that seem less relevant to our modern world. Our twenty-first-century focus centers on the right "to keep and bear Arms," wholly removed from the prefatory clause explaining that "a well regulated Militia, being necessary to the security of a free State," requires *something*.<sup>25</sup> What that something is no longer seems relevant because we are not living in the Founders' world. We do not have militias and really do not worry about whether these obsolescent forces are well or poorly regulated. We care about guns. Deeply. Religiously. And the current Second Amendment's phraseology seems to only hinder our efforts to have meaningful conversations about the depth and breadth of an individual's right "to keep and bear arms." We can continue on the path of affording the constitutional interpretation to the Supreme Court. Or, we can adapt the Amendment to meet the needs of a much different, modern world.

Part II of this Article traces the history of the founding generation, having been both victimized by and proponents of selective disarmament. Our current Second Amendment should have numerous footnotes attached to the fourteen words protecting the right to "keep and bear arms," thereby ensuring that both lawyers and historians appreciate the true origin of this limited right.<sup>26</sup> Regulations have always been a part of gun ownership in

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owned guns . . . ." *Id.* at 147. Professor Churchill explains that most white males were expected, if not required, to "keep arms." *Id.* at 147–49. The fact that Professor Churchill's scholarship demonstrates a right to "keep arms" does not necessarily support the majority opinion in *District of Columbia v. Heller*, which suggests that keeping and bearing arms are and were intended to be synonymous. 554 U.S. 570, 582–86 (2008). *Heller* is where history and text may begin to part ways.

<sup>24</sup> It is also critical to note that at least one historian's research has been roundly criticized for a lack of demonstrable accuracy. Michael Bellesiles published regularly in this area, but has subsequently been challenged for his historical reliability. See James Lindgren, Book Review, *Fall From Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195, 2197 (2002) ("Since the book's publication, scholars who have checked the book's claims against its sources have uncovered an almost unprecedented number of discrepancies, errors, and omissions.").

<sup>25</sup> U.S. CONST. amend II; see also Churchill, *supra* note 22, at 172 ("We have very few eighteenth-century commentaries on the meaning of the final draft of the Second Amendment.").

<sup>26</sup> While Professor Churchill indicates that "at no time between 1607 and 1815 did the colonial or state governments of what would become the first fourteen states exercise a police power to restrict the ownership of guns by members of the body politic," Churchill, *supra* note 22, at 142, this "body politic" strictly meant able-bodied white males. The issue of ownership was quite clearly distinct from the issue of use as both colonial and state legislatures strictly regulated the use of weaponry. White men could "keep arms" but they were not always free to "use" arms. *Id.* at 172–74.

this country.<sup>27</sup> The debate has never been about whether such ownership rights exist but, rather, which governmental entities are entrusted to promulgate regulations and interpret them.

Part III introduces the “collective rights” and “standard model” approaches to Second Amendment analysis. Each approach claims to have the more accurate view of history. But, as we move further away from originalism and become more comfortable with a “living Constitution,” Part III inquires whether history really matters in this dialogue at all. These historical mysteries, or inconsistencies, merely give further credence to the need for amending and improving the Second Amendment to reflect the modern approach, all while returning power to the states rather than relying on the U.S. Supreme Court and its ever-changing composition.

Part IV addresses the Supreme Court’s recent decisions in *Heller* and *McDonald*. Prior to 2008, the Second Amendment had lain dormant for seven decades.<sup>28</sup> The Court’s current treatment of the Second Amendment proves the vulnerability of leaving interpretation of our “living Constitution” solely to the province of the judicial department. With a bitterly divided Supreme Court, it is likely that we have not heard its last word on the meaning of the Second Amendment. This uncertainty should give pause to even the most ardent supporter of gun rights.

Part V provides this author’s solution to the current Second Amendment dilemma. Rather than battle over whether the Second Amendment’s militia clause means anything, the time has come to draft an entirely new amendment that protects lawful gun owners in a clear manner. Our current Second Amendment means only part of what it says, as a functioning Militia has long been absent from American society. Our Founders provided us with the ideal tool to ameliorate outdated language, avoid confused interpretations, and modernize the protections afforded by our Constitution. Article V was put in the Constitution to permit future generations to revise the Constitution to address concerns the Founders never could have envisioned or anticipated. Article V gave us the Second Amendment. Article V gave us the Bill of Rights. While it may feel uncomfortable to rely on Article V, this author believes that Article V provides an excellent opportunity for modern society to improve our great Constitution, rather than continuing to rely upon the Supreme Court to define the parameters of lawful gun ownership.

But first, we must convince ourselves that what remains in place is unworkable. While many might disapprove of this proposal, I wonder whether anyone in this country is content or secure with relying on our

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<sup>27</sup> See *id.* at 143 (“Hundreds of individual statutes regulated the possession and use of guns in colonial and early national America.”).

<sup>28</sup> The last significant challenge to the Second Amendment was in *United States v. Miller*, 307 U.S. 174 (1939).

current paradigm to interpret the Second Amendment. The conversation about gun rights and regulations is growing more frequent. Both sides want change and assurances, neither having found sufficient solace in the existing Second Amendment. The author's personal experience is that most individuals agree there is a pre-existing right to own weaponry, particularly guns. But, as regulations persist in this area, we must ask which entity is best suited to solve the needs of the people and, particularly, lawful gun owners: the Supreme Court or state legislatures? The author's answer to this question propels a states' rights solution.

## II. HISTORICAL REALITIES

For all the cries of constitutional heritage, one thing is certain: the Second Amendment's "right to keep and bear arms" was nowhere catalogued in the Declaration of Independence as a grievance against King George III.<sup>29</sup> The Third Amendment's quartering of soldiers was clearly articulated.<sup>30</sup> The threat posed by standing armies was also mentioned.<sup>31</sup> There were even comments regarding the slave trade, later omitted.<sup>32</sup> But, for all the claims of historical pedigree, the so-called individual right to "keep and bear arms"—currently disconnected from its contextual affiliation with the militia—was apparently not the impetus for calling forth the American Revolution.<sup>33</sup>

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<sup>29</sup> See Peter Buck Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46, 53 (1967) ("Apparently, no grievance leading or contributing to the [American] Revolution involved the disarming of an individual, and no evidence shows that either the populace or the revolutionary leaders conceived any individual right to bear arms as having been violated by British colonial policy.").

<sup>30</sup> See THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776) ("For quartering large bodies of armed troops among us . . .").

<sup>31</sup> See *id.* at para. 13 ("He has kept among us, in times of peace, standing armies without the consent of our legislatures.").

<sup>32</sup> Thomas Jefferson, Jefferson's "original Rough draught" of the Declaration of Independence, in 1 THE PAPERS OF THOMAS JEFFERSON: 1760–1776, at 423–28 (Julian P. Boyd et al. eds., 1950). Jefferson's first draft of the Declaration of Independence chastised King George III because:

[H]e has waged cruel war against human nature itself, violating it's most sacred rights of life & liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. this piratical warfare, the opprobrium of *infidel* powers, is the warfare on the CHRISTIAN king of Great Britain, determined to keep open a market where MEN should be bought & sold . . .

*Id.* at 426. These comments were later excised by the broader committee working on the Declaration of Independence. Tania Tetlow, *The Founders and Slavery: A Crisis of Conscience*, 3 J. LOY. PUB. INT. L. 1, 11 (2001).

<sup>33</sup> See Feller & Gotting, *supra* note 29, at 53 ("The battles of Lexington and Concord were not engendered by the British intentions to disarm a single man, but rather their move to disarm the militia."); see also Akhil Reed Amar, *Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103, 109 (2002)

Instead, most historians and legal observers trace the roots of our Second Amendment back to the English Bill of Rights and the colonists' fear of a standing army.<sup>34</sup> Neither hunting nor self-protection, individually speaking, motivated the Founders to create the Second Amendment.<sup>35</sup> Rather, the right to arms—both English and colonial—stemmed from militia obligations and was always, absolutely always, conditioned on being an able-bodied, white male, usually of a particular religious faith.<sup>36</sup> Militias, it was believed, provided the best defense against standing armies and tyranny.<sup>37</sup>

Fear likewise motivated another colonial stance toward weaponry: selective disarmament. As suggested by the Declaration of Independence, which spoke disparagingly of the "Indian savages,"<sup>38</sup> the Colonies distrusted Native Americans and outlawed them from having arms and munitions.<sup>39</sup> Despite Thomas Jefferson's initial statements of offense regarding slavery in the draft Declaration of Independence, blacks—both free and slave—were precluded from keeping or bearing arms due to a fear that their arming would undermine, if not abolish, the institution of

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(explaining the connection between the Second Amendment and the desire to prevent the "king's men" from having the only arms).

<sup>34</sup> E.g., Feller & Gotting, *supra* note 29, at 53.

<sup>35</sup> William G. Merkel, *A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment*, 17 STAN. L. & POL'Y REV. 671, 680 (2006).

<sup>36</sup> For example, the Second Congress limited militia service to "each and every free able-bodied white male citizen . . . who is or shall be of the age of eighteen years, and under the age of forty-five years." Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271; *see also* United States v. Tooley, 717 F. Supp. 2d 580, 589 (S.D. W. Va. 2010) ("While religious tolerance was higher in the colonies, at least some scholars believe that certain colonies disarmed their Catholic population.").

<sup>37</sup> *See* District of Columbia v. Heller, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting) (The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. . . . [as] a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States.").

<sup>38</sup> THE DECLARATION OF INDEPENDENCE para. 28 (U.S. 1776). King George was condemned by colonists for exciting "domestic insurrections amongst us, and [endeavoring] to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions." *Id.*

<sup>39</sup> *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 319 (1991) ("The English distrust of the lower classes, and then certain religious groups, was replaced in America by a distrust of two racial minorities: Native Americans and blacks."); David Thomas König, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms,"* 22 LAW & HIST. REV. 119, 152–53 (2004) (noting that New Hampshire had exempted "Quakers, Negroes, Indians, and Mulattoes, among others, from [state] militia service" (internal quotation marks omitted)). Cottrol and Diamond further explain that "an armed and universally deputized white population was necessary not only to ward off dangers from the armies of other European powers, but also to ward off attacks from the indigenous population." Cottrol & Diamond, *supra*, at 324.

slavery.<sup>40</sup> Early Americans thus engaged in the same form of selective disarmament that English Protestants engaged in when disarming the Catholics.<sup>41</sup> Targeted disarmament of discrete minority populations was regularly practiced both before and after the ratification of the Second Amendment.<sup>42</sup> All of this illustrates that certain categories of people, though changing in description, have always been subjectively deemed too dangerous, too radical, or too unpredictable to have weaponry.<sup>43</sup> Even today, Justice Scalia speaks of “the longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . [and] laws imposing conditions and qualifications on the commercial sale of arms.”<sup>44</sup>

The Founders knew all too well that arms were power and disarmament kept mischief, particularly from “undesirable” individuals, at bay.<sup>45</sup> So in many ways, fear—of a standing army and of the untrustworthy—was the motivation for early American gun laws. While ironically clamoring for a right to “keep and bear arms” as a defense against tyranny, the Founders and colonial legislators ensured that those who might challenge the white hierarchy of our nascent democracy would not have access to the very weaponry that seemed so vital, at least rhetorically, to the nation’s survival.<sup>46</sup> Our Constitution, in its original

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<sup>40</sup> See Cottrol & Diamond, *supra* note 39, at 324 (“An armed white population was also essential to maintain social control over blacks and Indians who toiled unwillingly as slaves and servants in English settlements.” (footnote omitted)); *supra* note 32 (citing Jefferson’s remarks).

<sup>41</sup> Patrick J. Charles, “Arms for Their Defence”?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should be Incorporated in *McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351, 398–403 (2009); Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 10–11 (1996); see *supra* note 36 (observing that Catholics were likely disarmed by colonists).

<sup>42</sup> See *United States v. Tooley*, 717 F. Supp. 2d 580, 589 (S.D. W. Va. 2010) (“It is apparently undisputed that other classes of early Americans, including Native Americans, free blacks, and those who refused to swear a loyalty oath, were often restricted from owning firearms.”). *Tooley* presents an exceptional historical explanation of firearm regulation and the Second Amendment. *Id.* at 587–92.

<sup>43</sup> *Id.* at 588–90. Our English ancestors regularly disarmed individuals believed to be “dangerous to the Peace of the Kingdome.” *Id.* at 589 (quoting Charles, *supra* note 41, at 365) (internal quotation marks omitted). Likewise, “it is clear that the colonists, at least in some manner, carried on the English tradition of disarming those viewed as ‘disaffected and dangerous.’” *Id.* at 590. The tradition of taking firearms away from racial minorities persisted after the ratification of the Fourteenth Amendment and through the black codes and Jim Crow laws. Cramer, *supra* note 20, at 20–21. In the 1960s, California was motivated by the Black Panthers’ open and armed protest activities to pass restrictive gun legislation. *Id.* at 21.

<sup>44</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

<sup>45</sup> See Don Higginbotham, *The Second Amendment in Historical Context*, 16 CONST. COMMENT. 263, 267 (1999) (noting the legislative efforts to “disarm those socially undesirable persons such as Catholics, white servants, and Africans (both slaves and free blacks) who might somehow acquire weapons”).

<sup>46</sup> See Cottrol & Diamond, *supra* note 39, at 319 (“The English distrust of the lower classes, and then certain religious groups, was replaced in America by a distrust of two racial minorities: Native Americans and blacks.”); see also Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167, 184 (2000) (“The Second Amendment may

form, offered far from an egalitarian right to arms.<sup>47</sup> While the lexicon suggests aspirations for “We the People,”<sup>48</sup> a cursory evaluation of “the people” underscores how narrow the eighteenth-century definition was—and was intended to be. Our modern, post-Fourteenth Amendment society drastically alters this landscape.

The Second Amendment, seen modernly as an individual protection of some variation, stood silent for decades while millions of Americans were purposefully disarmed and or otherwise restricted from carrying weapons.<sup>49</sup> To recast the Second Amendment as a broad and inclusive right for all requires cognitive dissidence between our disarming past and our amnestic present.<sup>50</sup> Or, to suggest this right is without limitation turns a blind eye to history.<sup>51</sup> Justice Scalia acknowledges this past in the *Heller* case, noting:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the

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have been not merely ‘of the white people’ and ‘by the white people’ but also, at least to an extent, ‘for the white people.’”).

<sup>47</sup> See Cottrol & Diamond, *supra* note 39, at 326–27 (noting that the colonial laws “reflected the desire to maintain white [male] supremacy and control”).

<sup>48</sup> U.S. CONST. pmbl.

<sup>49</sup> This author believes that there is, undoubtedly, an individual right component to the Second Amendment. However, history suggests that the nature of that right was exclusive and generally conditioned on being of a particular race, gender, and station in life. Thus, to suggest as the Supreme Court does in *Heller* that “the Second Amendment right is exercised individually and belongs to all Americans,” 554 U.S. at 581, seems both fatally over- and under-inclusive.

<sup>50</sup> See Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 7–8 (1989) (stating that the old common law of England, which was adopted in large part by the American Colonies, contained no absolute right to have arms). Ehrman and Henigan observed:

A central thesis of opponents of strong firearms regulations is that the old common law of England supports a fundamental, personal right to be armed. There is no dispute that the common law of England was in large part adopted by the American colonies, or that it was at least highly influential . . . . It is highly doubtful, however, that an absolute right to have arms was one of those rights or liberties. The predominant, and better view, is that there was no such common law right.

*Id.*

<sup>51</sup> This holds true even within the narrower militia-based context of the Second Amendment. The term “white,” used to circumscribe the “able-bodied male citizens” federally compelled to enter militia service, was not removed from the federal militia law until 1862—a full seventy years after the ratification of the Second Amendment. Act of July 17, 1862, ch. 201, § 1, 12 Stat. 597, 597.

Second Amendment or state analogues.<sup>52</sup>

The right to keep and bear arms has always been burdened by regulations, although the types of limitations have changed over time. Thus, we must make peace with our embarrassing, ironic, radical, and limited Second Amendment.<sup>53</sup> Or we could simply advance our rights as Americans to lawfully own and use firearms in a thoroughly modern Article V exercise.

Historically, only five Supreme Court opinions have directly evaluated the Second Amendment.<sup>54</sup> Only in the most recent two, *Heller* and *McDonald*, does one encounter a surprisingly contemporary approach to constitutional interpretation.<sup>55</sup> For the first time in our constitutional history the Second Amendment provides an individual right to arms that is unconnected to militia service and disconnected from militia weaponry.<sup>56</sup> One of the last provisions of the Bill of Rights to be deemed incorporated,

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<sup>52</sup> *Heller*, 554 U.S. at 626 (citations omitted).

<sup>53</sup> See *supra* notes 17–20 and accompanying text.

<sup>54</sup> Prior to the Supreme Court's two recent opinions, the Court had "handed down only three direct opinions on the Second Amendment, the last one coming in 1939." Higginbotham, *supra* note 45, at 263. The three cases preceding *Heller* and *McDonald* are *United States v. Miller*, 307 U.S. 174 (1939); *Presser v. Illinois*, 116 U.S. 252 (1886); and *United States v. Cruikshank*, 92 U.S. 542 (1875).

<sup>55</sup> The Georgia Supreme Court explained the classic Second Amendment interpretation—which remained the governing approach until 2008—as follows:

Were this question [of what is meant by the right to "keep and bear arms"] entirely a new one, I should not myself hesitate to hold that the language of the constitution of this state, as well as that of the United States, guarantees only the right to keep and bear the "arms" necessary for a militiaman. It is to secure the existence of a well regulated militia; that, by the express words of the clause, was the object of it, and I have always been at a loss to follow the line of thought that extends the guarantee to the right to carry pistols, dirks, Bowie-knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day. It is in my judgment a perversion of the meaning of the word arms, as used in the phrase "the right to keep and bear arms," to treat it as including weapons of this character. The preamble to the clause is the key to the meaning of it. The word "arms," evidently means the arms of a militiaman, the weapons ordinarily used in battle, to-wit: guns of every kind, swords, bayonets, horseman's pistols, etc. The very words, "bear arms," had then and now have, a technical meaning. The "arms bearing" part of a people, were its men fit for service on the field of battle. That country was "armed" that had an army ready for fight. The call "to arms," was a call to put on the habiliments of battle, and I greatly doubt if in any good author of those days, a use of the word arms when applied to a people, can be found, which includes pocket-pistols, dirks, sword-canes, toothpicks, Bowie-knives, and a host of other relics of past barbarism, or inventions of modern savagery of like character. In what manner the right to keep and bear these pests of society, can encourage or secure the existence of a militia, and especially of a well regulated militia, I am not able to devine.

*Hill v. State*, 53 Ga. 472, 474–75 (1874); see also *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (noting the individual rights model "has long been rejected").

<sup>56</sup> *Heller*, 554 U.S. at 595.

the Second Amendment, was first found to apply to the individual states after nearly two hundred years of jurisprudence holding to the contrary, purportedly by the originalist wing of the Court.<sup>57</sup> This thoroughly modern interpretation, based on the “individual rights” paradigm, is explained by Justice Scalia as follows:

It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment’s guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified, and it was not until after World War II that we held a law invalid under the Establishment Clause. Even a question as basic as the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding. It is demonstrably not true that, as Justice Stevens claims, “for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial.” For most of our history the question did not present itself.<sup>58</sup>

Our revolutionary Founders would find the individual rights model quite foreign, if not offensive.<sup>59</sup> It bears noting that the Fourteenth Amendment and the incorporation of most portions of the Bill of Rights against the states was not the design of the Founders. But for the ratification of Fourteenth Amendment, the Second Amendment would only be a protection against the federal government—leaving many of the modern claims challenging excessive state regulation without any form of redress or recognition. Gun regulation, in some form, existed in each of the individual states when the Second Amendment was ratified.<sup>60</sup>

Further, the Founders were anything but populist when it came to weapons and the notions of who might be trusted with arms. In this

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<sup>57</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

<sup>58</sup> *Heller*, 554 U.S. at 625–26 (citations omitted).

<sup>59</sup> See Higginbotham, *supra* note 45, at 267 (pointing out the possibility that “the Framers were most interested in citizens, possessing military style weapons, limited to military purposes, for employment only during their militia service”).

<sup>60</sup> See Churchill, *supra* note 22, at 143 (“Hundreds of individual statutes regulated the possession and use of guns in colonial and early national America.”); see also *id.* at 161–65 (describing gun regulations in early America).



manner, the Founders perpetuated our English heritage of discriminating between who could be trusted with weapons and who could not.<sup>61</sup> Blacks—both free and slave—Indians, non-Loyalists, Catholics, and other groups were selectively excluded from legal access to weaponry.<sup>62</sup> Today, we continue to disarm those that society deems untrustworthy, such as felons,<sup>63</sup> domestic abusers,<sup>64</sup> minors,<sup>65</sup> and individuals with severe mental illness.<sup>66</sup> Disarmament is part of our country, our history, and our heritage relating to guns, but regulations should not, in any manner, be disarming those that are trustworthy and capable of lawfully owning guns.

Today, some two centuries beyond the Second Amendment, we find ourselves at the juncture of another modern revolution. The modern revolution is not one seeking freedom or democracy. The issues are not slavery, savages, or standing armies.<sup>67</sup> Rather, the modern revolution is how to deal with an armed populace seemingly detached from the original

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<sup>61</sup> Justice Scalia, writing for the majority in *Heller*, provided the English ancestry of the Second Amendment as follows:

Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. Under the auspices of the 1671 Game Act, for example, the Catholic Charles II had ordered general disarmaments of regions home to his Protestant enemies. These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Right (which was codified as the English Bill of Rights), that Protestants would never be disarmed: "That the Subjects which are Protestants may have Arms for their Defense suitable to their Conditions and as allowed by Law." This right has long been understood to be the predecessor to our Second Amendment.

554 U.S. at 592–93 (citations omitted). Thus, disarmament is, at its core, a significant component of our firearms-related heritage.

<sup>62</sup> See *supra* notes 38–43 and accompanying text.

<sup>63</sup> 18 U.S.C. § 922(g)(1) (2012).

<sup>64</sup> *Id.* § 922(g)(8).

<sup>65</sup> *Id.* § 922(x)(2). For an early example of a court upholding bans on the arming of minors, see *State v. Callicutt*, 69 Tenn. 714, 716–17 (1878).

<sup>66</sup> 18 U.S.C. § 922(g)(4); see also *Heller*, 554 U.S. at 626–27 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill . . .").

<sup>67</sup> See Merkel, *supra* note 35, at 682–83 (underscoring the paradox between the colonial reticence of standing armies and our modern affinity for the world's most impressive military force). Professor Merkel argues that today, "[w]e have grown to like military contractors and overseas military adventures and to live with high taxes and huge deficits. We want military bases in our neighborhoods. We fight to keep them from closing just as New Englanders of 1775 fought to shut them down." *Id.* at 683.

meaning of the Second Amendment.<sup>68</sup> How are we to analyze laws restricting guns and munitions or calling for universal background checks? How can we constitutionally confront mass shootings and the tragic legacies of Tucson, Aurora, and Newtown while zealously protecting the rights of lawful gun owners, including the right to concealed carry? Do “stand your ground” laws truly have grounding in the Second Amendment’s militia focus? And, even though “open carry” laws were not tolerated for much of our history, they are a staple in many states today, including the author’s home state of Texas. Open carry laws, regardless of historical views, should not be made dependent on national tolerance or the U.S. Supreme Court’s interpretation, but rather, should remain firmly protected in the local democracy of state legislators.

Questions regarding the breadth of Second Amendment rights have been partially answered, but the answers are still subject to fierce debate and continuing interpretation. The current solution feels vulnerable, even fleeting.<sup>69</sup> Perhaps a better solution to these issues lies in the text of the original Constitution rather than the incomprehensible meaning of the Second Amendment’s twenty-seven words.<sup>70</sup> Can Article V provide the solace needed for both sides of the modern debate?<sup>71</sup>

This author’s solution to the Second Amendment conundrum is simple, yet perhaps feels uncomfortable. History has not resolved the issue; scholars have not resolved the issue.<sup>72</sup> And, with a closely divided

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<sup>68</sup> See Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161, 166 (2004) (“The right protected by the Second Amendment was one enjoyed by citizens who used their privately owned weapons in a well-regulated militia.”).

<sup>69</sup> *Heller* was a narrow 5–4 decision. *Heller*, 554 U.S. at 572. And *McDonald* was even more fragmented with a 4–1–4 plurality opinion. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010).

<sup>70</sup> See Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 111 (2000) (“Our quest to discover a perfect syntax and vocabulary for [these] twenty-seven words thus risks ascribing to a general statement of principle a measure of legal exactitude it was never conceived to carry.”).

<sup>71</sup> Cf. *Schneiderman v. United States*, 320 U.S. 118, 137 (1943) (“The constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come. Instead they wrote Article V . . . . Article V contains procedural provisions for constitutional change by amendment without any present limitation whatsoever except that no State may be deprived of equal representation in the Senate without its consent.”).

<sup>72</sup> E.g., *McDonald*, 130 S. Ct. at 3121 (Breyer, J., dissenting). Justice Breyer wrote:

The Court based its conclusions almost exclusively upon its reading of history. But the relevant history in *Heller* was far from clear: Four dissenting Justices disagreed with the majority’s historical analysis. And subsequent scholarly writing reveals why disputed history provides treacherous ground on which to build decisions written by judges who are not expert at history. Since *Heller*, historians, scholars, and judges have continued to express the view that the Court’s historical account was flawed.

Supreme Court, any resolution that may appear secure now is tenuous at best. Should lawful gun owners leave their rights to the chance interpretation of the U.S. Supreme Court? The recent 5-4 and plurality decisions regarding the Second Amendment illustrate how evanescent current case law may be. The change of a single Justice could overturn the entire doctrine.

While many Americans resist changing our Constitution, being understandably proud of its enduring nature, the Founders envisioned precisely this quandary and provided us a protective tool in Article V.<sup>73</sup> Perhaps the time has come to use the Founders' tool to protect against Judicial overreach. Perhaps the time has come to amend the Second Amendment with a states' rights model that returns power to the state legislatures rather than the federal government. Our constitutional paradigm places the ultimate authority for interpreting constitutional questions with the Supreme Court. A thoughtful amendment to the Second Amendment that returns the power of regulating lawful gun owners to our state legislators could offer the best compromise between those seeking regulation and those wanting full protection to lawfully own and use guns. The solution may sound revolutionary. But, in fact, the tool being suggested is one the Founders provided and one that others recognizing the potential for judicial overreach in our broken federal system are also embracing.

### III. THE TOOLS OF THE LAWYER

[Originalism's] greatest defect, in my view, is the difficulty of applying it correctly. . . . [W]hat is true *is* that it is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of the material—many of the

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<sup>73</sup> Article V reads, in pertinent part, as follows:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid as to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by the Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress . . . .

U.S. CONST. art. V.

reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.<sup>74</sup>

When the Supreme Court decided *United States v. Heller*, it did so using the tools of the lawyer, rather than the historian. The Supreme Court utilized this approach despite Justice Scalia's own admonishment that when seeking to interpret the original meaning of our Constitution's amendments, the task is "sometimes better suited to the historian than the lawyer."<sup>75</sup> This author is conflicted, recognizing that history has a chameleon-like quality, often changing to suit the needs of a particular time or a particular situation.<sup>76</sup> But, a Constitution should not be so elastic. When it becomes so—varying in interpretation depending on the viewpoint of the interpreter—perhaps the time has come to change its meaning through amendment rather than historical interpretation or judicial caprice. Before embarking on such a rarely traveled path, however, perhaps we should heed the words of Justice Scalia and review the works of the historians and lawyers.

### A. *Competing Historical Models*

Current Second Amendment scholarship can be divided into two distinct camps: the self-proclaimed "standard model,"<sup>77</sup> which embraces an individual right to keep and bear arms,<sup>78</sup> and the more traditional

<sup>74</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989).

<sup>75</sup> *Id.* at 857.

<sup>76</sup> Cf. Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 613–15 (2008) (noting that the further society moves "from the time of adoption, the more likely it is that assertions about then-contemporary public meaning will not track the public meaning at the time of adoption").

<sup>77</sup> See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 466 (1995) (defining the Second Amendment as rooted in "an individual right to keep and bear arms"). Professor Glenn Harlan Reynolds, a constitutional law scholar, coined the phrase "standard model," explaining that "there is sufficient consensus on many [Second Amendment] issues that one can properly speak of a 'Standard Model' in Second Amendment theory, much as physicists and cosmologists speak of a 'Standard Model' in terms of the creation and evolution of the Universe." *Id.* at 463. However, historians, like Professor Jack N. Rakove, express some indignation toward those "march[ing] under the banner of the self-proclaimed 'standard model.'" Rakove, *supra* note 70, at 103.

<sup>78</sup> See, e.g., Joyce Lee Malcolm, *The Supreme Court and the Uses of History: District of Columbia v. Heller*, 56 UCLA L. REV. 1377, 1381 (2009) (remarking that "[f]or most of its history the Second Amendment was understood to confer an individual right"). Notably, the author did not support this statement with a citation. For articles written by other standard model scholars, see Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, *"This Right Is Not Allowed by*

“collective rights” model, which is urged more by historians than lawyers.<sup>79</sup> However, these two approaches are not, and should not be, the only options in evaluating the Second Amendment.<sup>80</sup> Historians continue their assault against the standard model, protesting that its scholars at times demonstrate a selective<sup>81</sup> approach toward history.<sup>82</sup> The standard model may be more aptly called the “twenty-first-century model,” as a thorough review of case law, statutory evolution, and nineteenth-<sup>83</sup> and early twentieth-century scholarship<sup>84</sup> suggests the standard model is, in some

*Governments that Are Afraid of the People”: The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 GEO. MASON L. REV. 823 (2010); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms,”* 49 LAW & CONTEMP. PROBS. 151 (1986); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 144–45 (1986); David B. Kopel, *The Great Gun Control War of the Twentieth Century—and Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527 (2012); Reynolds, *supra* note 77; and Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

<sup>79</sup> Merkel, *supra* note 35, at 676. Professor Merkel notes that he and others have urged a more centrist position, “acknowledging that the right to arms was intended to attach to individuals, but stressing that it was also understood to serve overwhelmingly public purposes rather than private ones such as personal self-defense or the needs of hunters.” *Id.*

<sup>80</sup> *Id.*; see also Amar, *supra* note 33, at 103 (arguing that both individual rights and states’ rights proponents are wrong in their interpretation of the Second Amendment); Cornell, *supra* note 68, at 161 (suggesting that neither the individual rights view nor the collective rights view is the appropriate paradigm to think about the Second Amendment).

<sup>81</sup> One such “selective” example is Professor Malcolm’s unsupported statement that “American society trusted the good sense of ordinary citizens in permitting them to be armed.” Malcolm, *supra* note 78, at 1381. This statement does not contain any citation so it is difficult to appreciate what is being referenced. As her article demonstrates, the Founders aggressively sought to disarm—out of distrust—Native Americans and African-Americans, both free and slave. See *id.* (describing the growing distrust emerging in the early twentieth century that led to discriminatory state laws limiting some individual’s gun rights). Further, her article confirms that nearly every state has had laws that keep weapons out of the hands of those deemed untrustworthy or those weapons deemed more dangerous than sensible. See *id.* at 1381–82 (providing examples of state and municipal laws which restrict ownership of firearms).

<sup>82</sup> See Merkel, *supra* note 35, at 685 (chastising the legal academy’s deficient history by stating that “much of the history that supplies the allegedly empirical basis for Second Amendment theorizing cannot be taken seriously on its own terms, and would be censured in any vigorous undergraduate program even in an educational milieu otherwise committed to positive reinforcement”).

<sup>83</sup> See John F. Dillon, *The Right to Keep and Bear Arms for Private and Public Defense*, 1 CENT. L.J. 259, 259–61 (1874) (providing examples of cases involving the right to bear arms from the nineteenth century).

<sup>84</sup> See Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 476–77 (1915) (urging that the Second Amendment “should be construed in connection with the well-known objection to standing armies and the general belief in the need and sufficiency of a well-regulated militia for the defense of the people and the state” rather than an individual rights model); George I. Haight, *The Right to Keep and Bear Arms*, 2 BILL RTS. REV. 31, 31 (1941) (“The right . . . must be read in keeping with the context which indicates the purpose of the right, namely: to secure the maintenance of a well-regulated militia.”); Daniel J. McKenna, *The Right to Keep and Bear Arms*, 12 MARQ. L. REV. 138, 143 (1928) (“Judging from the prevailing trend of the cases, it would seem as if

measure, ahistorical.<sup>85</sup> In determining the breadth of the Second Amendment, “[n]o coherent intention or understanding of the existence and scope of a private, individual right to keep and bear arms could [have been historically] derived, because that question did not present itself for public debate in the form in which we now know it.”<sup>86</sup> The aim of the Second Amendment, pure and simple, was the ability to retain militias as a guard against tyranny.<sup>87</sup> As one scholar exclaims, “The Framers envisioned Minutemen bearing guns, not Daniel Boone gunning bears.”<sup>88</sup>

The twenty-first-century prism of individual rights used by the standard model scholars does not adequately appreciate the limited nature of individual rights during the colonial period; nor does it accurately portray custom and legislation that governed a society fearful of standing armies and lacked a professional police force.<sup>89</sup> We are ill-equipped to appreciate the colonists’ dedication to militias preserved in the Second Amendment. The vernacular of “hue and cry,” “musket,” and “firelock” is as foreign to us as the notion of “substantive due process” and “incorporation” would be to our Founders. Claims that the Second Amendment permitted everyone to own weaponry would be an affront to eighteenth-century mores. The Founders would likely challenge the notion that the government could not register weaponry or prohibit gun ownership.<sup>90</sup> Unlike modern Americans, the founding generation endured mandatory gun registration as a basis for ensuring a functional militia, and routinely disarmed those considered threatening to the established social order.<sup>91</sup> Individual rights, as such, were far more limited in colonial America than those that exist now. Post-Fourteenth Amendment, our society is one that embraces individualism and personal liberties—from gun ownership to claims of reproductive freedom. Such a constitutional

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the Second Amendment only forbids Congress so to disarm citizens as to prevent them from functioning as state militia men.”).

<sup>85</sup> See Cornell, *supra* note 68, at 161 (challenging that “[w]hile this neat dichotomy furthers the interests of those involved in modern political debates about gun policy, it is not particularly useful for understanding the eighteenth-century world in which the Second Amendment was drafted and adopted”); see also Rakove, *supra* note 70, at 111–12 (suggesting that the Founders only considered the militia—and not individual rights—in their public debates when enacting the Second Amendment).

<sup>86</sup> Rakove, *supra* note 70, at 112.

<sup>87</sup> *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008).

<sup>88</sup> Amar, *supra* note 33, at 106.

<sup>89</sup> *Id.*; see also Ehrman & Henigan, *supra* note 50, at 34–35 (explaining that the militias “gave the states a source of internal police power”); Lund, *supra* note 41, at 7 (describing how the Crown, like the Colonies, “lacked the financial resources to maintain a permanent army or police force”).

<sup>90</sup> Adam Winkler, *The Secret History of Guns*, THE ATLANTIC (July 24, 2011), [http://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/?single\\_page=true](http://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/?single_page=true).

<sup>91</sup> *Id.*; see also Rakove, *supra* note 70, at 110 (“The American colonies and states were not a libertarian utopia; their traditions of governance permitted legislatures and institutions of local government to act vigorously in the pursuit of public health and safety.”).

paradigm would have been quite unthinkable in the colonial era.

Our Founders feared, above most other issues, two things: (1) a standing army, having lived through King George's quartering of soldiers in colonial homes; and (2) governmental tyranny.<sup>92</sup> These fears were classically English and date back to the ouster of James II during the Glorious Revolution. While the standard model scholars speak of the English Bill of Rights as if it were comparable to our Bill of Rights, a contextual review of the ascension of William and Mary to the English throne demonstrates, quite clearly, that the motivations behind the so-called English Bill of Rights were the same grievances that our Founders placed in the Declaration of Independence: governmental tyranny, contempt for standing armies, and disdain for the quartering of soldiers in citizens' homes.<sup>93</sup> The disarmament issue was intimately tied to these primary issues with militias proffering the first line of collective, communal defense.<sup>94</sup> Militias were a critical part of early America.<sup>95</sup> Today, modern Americans embrace our impressive military without a fear that soldiers will be forced to take refuge in our homes. Further, we rely on our soldiers to keep us safe from all threats to our security and liberty and regularly celebrate the standing military that is part of the fabric of this great nation.

Through this eighteenth-century lens—one where the Bill of Rights was intended to limit the federal government from encroaching on states' rights—scholars should appreciate the limited approach to colonial-era "rights."<sup>96</sup> Rights in 1787 and 1791 were vastly cabined in contrast to rights as we speak of them today.<sup>97</sup> To modernize, or revise, history by urging the contemporary viewpoint of a post-Fourteenth Amendment Bill of Rights as securing "my individual rights," is to alter both the colonial viewpoint and experience.<sup>98</sup> It is an attempt to modernize *their* eighteenth-

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<sup>92</sup> Paul Finkelman, "A Well Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 205 (2000) ("According to the traditional Whig and Republican ideology of this period, a standing army threatened the liberties of a free people. This argument was rooted in English history . . .").

<sup>93</sup> Finkelman, *supra* note 92, at 205–06; see also Roy Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 977–79 (1975).

<sup>94</sup> See Finkelman, *supra* note 92, at 226 (observing that any "right" to own weapons, as such, was collective in nature, always being related to an individual's service in a "well regulated militia" (internal quotation marks omitted)).

<sup>95</sup> Steven J. Heyman, *Natural Rights and the Second Amendment*, 6 CHI.-KENT L. REV. 237, 263 (2000).

<sup>96</sup> Finkelman, *supra* note 92, at 233.

<sup>97</sup> See Higginbotham, *supra* note 45, at 267 ("Given deep-seated beliefs about the corporate nature of society and mercantile practices, provincial lawmakers would have considered nineteenth-century liberalism or laissez-faire notions unthinkable.").

<sup>98</sup> See Cornell, *supra* note 68, at 164 (discussing an "alternative Second Amendment universe" to criticize the historical approach of the "standard model" scholars).

century Constitution to fit *our* twenty-first-century needs in an attempt to conform to the post-Fourteenth Amendment living Constitution.

### B. *Regulations vs. Rights*

Traditionally, the “right” to keep and bear arms was more properly considered a duty for able-bodied white males to be prepared to defend one’s community in cases of aggression or insurrection.<sup>99</sup> The twenty-first-century individualistic paradigm and vernacular of “my rights” did not exist in either English or early American history.<sup>100</sup> An “individual right,” to the extent such right existed, was recognized in colonial America more in the civic, communal sense and was generally tied to militia service.<sup>101</sup> State police power, in its most literal application, easily trumped individual rights.<sup>102</sup> Colonists and early nineteenth-century Americans appreciated that weapons were to be regulated, often registered, limited, or wholly prohibited.<sup>103</sup> They also appreciated that a large segment of the population—women, Indians, slaves, free blacks, and resident aliens—would have been openly denied this so-called “right.”<sup>104</sup> Nearly all states—either constitutionally or legislatively—retained the right to regulate weaponry, to determine which individuals were qualified to keep or bear arms, and to completely proscribe concealed weapons through the eighteenth, nineteenth, and twentieth centuries.<sup>105</sup>

Gun regulations and proscriptions were commonplace in the nineteenth

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<sup>99</sup> See Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL’Y REV. 571, 572 (2006) (describing the colonial militia experience as a civic versus an individual right).

<sup>100</sup> Cornell, *supra* note 68, at 164–65.

<sup>101</sup> *Id.* Cornell explains that such a civic right “was inextricably linked to the obligation to participate in communal defense as part of a well-regulated militia.” *Id.* at 165. Further, while “[w]omen, free Africans, and resident aliens might claim a genuinely individual right such as the right of religious conscience . . . they were not included among those who bore arms.” *Id.*

<sup>102</sup> See, e.g., Rakove, *supra* note 70, at 127 (explaining that the Framers rejected their opportunity to curb police power and state authority in regard to the individual’s right to bear arms). “Neither at Philadelphia nor New York would it have occurred to anyone to ask whether adoption or amendment of the Constitution would diminish the capacity of state and local governments, in the exercise of their conventional police powers, to impose legislative restrictions on the use or ownership of firearms.” *Id.*

<sup>103</sup> See Churchill, *supra* note 22, 161 (observing that colonial laws “required militiamen and other householders to bring their guns to the muster field twice a year so that militia officers could record which men in the community owned guns” and that “[s]ome colonies authorized door-to-door surveys of gun ownership”).

<sup>104</sup> Cornell, *supra* note 68, at 165.

<sup>105</sup> Rakove, *supra* note 70, at 110. Professor Rakove notes that “our reading of the Second Amendment is conditioned by the results of an era (or several eras) of modern rights-oriented jurisprudence which naturally assumes that bills of rights exist to create legally enforceable immunities against the coercive power of the state.” *Id.*



and early twentieth centuries.<sup>106</sup> The Second Amendment imposed no impediment. Historian Saul Cornell credits Kentucky as being the first American state to curb the carrying of concealed weapons.<sup>107</sup> Violations carried a fine of up to \$100, a substantial sum in 1813.<sup>108</sup> That same year, Louisiana passed a similar statute that made it a capital offense to kill or disable another person using a concealed weapon.<sup>109</sup> Indiana and other states soon followed suit, including prohibitions passed in Georgia, Virginia, Alabama, and Ohio between the years 1820 and 1859.<sup>110</sup>

In 1872, the Supreme Court of Texas used very strong language to find the Second Amendment inapplicable to its deadly weapon statute:

To refer the deadly devices and instruments called in the statute "deadly weapons," to the proper or necessary arms of a "well-regulated militia," is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the constitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit. The word "arms" in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense.<sup>111</sup>

The prevailing sentiment among courts and state legislatures was that this militia-based approach was settled law.<sup>112</sup> Concealed weapons laws, proscriptions against possessing a concealed weapon in the home, and other regulations passed under traditional police powers were regularly enforced; this was true in Arkansas,<sup>113</sup> Indiana,<sup>114</sup> Georgia,<sup>115</sup> Ohio,<sup>116</sup>

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<sup>106</sup> See, e.g., *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) (noting that "[w]eapon bearing was never treated as anything like an absolute right by the common law," and describing various state and federal regulations pertaining to dangerous weaponry), *rev'd*, 319 U.S. 463 (1943).

<sup>107</sup> Cornell, *supra* note 99, at 584. As Cornell describes, Kentucky "forbade anyone but travelers from carrying '[a] pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon.'" *Id.* (quoting Acts Passed at the First Session of the Twenty First General Assembly for the Commonwealth of Kentucky 100-11 (1813)).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 585.

<sup>111</sup> *English v. State*, 35 Tex. 473, 477 (1872).

<sup>112</sup> See, e.g., *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988) (discussing cases which "have analyzed the second amendment purely in terms of protecting state militias, rather than individual rights").

<sup>113</sup> See *Fife v. State*, 31 Ark. 455, 461 (1876) (approving a concealed weapon law after the ratification of the Fourteenth Amendment); *Carroll v. State*, 28 Ark. 99, 101 (1872) ("[A] constitutional right to bear arms in defense of person and property does not prohibit the legislature from making such police regulations as may be necessary for the good of society, as to the manner in which such arms

Kansas,<sup>117</sup> Oklahoma,<sup>118</sup> Delaware,<sup>119</sup> Missouri,<sup>120</sup> Tennessee,<sup>121</sup> North Carolina,<sup>122</sup> Pennsylvania,<sup>123</sup> Alabama,<sup>124</sup> Texas,<sup>125</sup> and Massachusetts,<sup>126</sup> among others.

Unsuccessful court challenges to gun regulations helped cement the notion that the Second Amendment did not apply to the individual states.<sup>127</sup> Courts universally found that state and federal gun restrictions were

shall be borne. Neither natural nor constitutional right authorizes a citizen to use his own property or bear his own arms in such a way as to injure the property or endanger the life of his fellow citizen . . . ."); *State v. Buzzard*, 4 Ark. 18, 18, 28 (1842) (finding that the defendant should have been indicted for violating the state concealed carry law).

<sup>114</sup> *State v. Mitchell*, 3 Blackf. 229, 229 (Ind. 1833).

<sup>115</sup> See *Strickland v. State*, 72 S.E. 260, 260, 269 (Ga. 1911) (upholding an act proscribing the carrying of a pistol or revolver post-Fourteenth Amendment ratification); *Brown v. State*, 39 S.E. 873, 873–74 (Ga. 1901) (upholding a concealed weapons law even against a person maintaining a concealed weapon in the privacy of his own home).

<sup>116</sup> See *State v. Nieto*, 130 N.E. 663, 663, 665 (Ohio 1920) (overturning a "[n]ot guilty" verdict where a weapon proscription was applied in the home).

<sup>117</sup> See *City of Salinas v. Blaskey*, 83 P. 619, 621 (Kan. 1905) ("The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities or towns, unless authorized to do so by law.").

<sup>118</sup> See *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908) ("Practically all of the states under constitutional provisions similar to ours have held that acts of the Legislatures against the carrying of weapons concealed did not conflict with such constitutional provision denying infringement of the right to bear arms, but were a valid exercise of the police power of the state.").

<sup>119</sup> See *State v. Quail*, 92 A. 859, 859 (Del. 1914) (finding an individual guilty of carrying a concealed weapon even though the revolver was unloaded).

<sup>120</sup> See *State v. Wilforth*, 74 Mo. 528, 528–29 (1881) ("The law prohibiting the wearing of concealed weapons, is a police regulation for the protection of society and not an infringement of the constitutional right to bear arms. It does not prohibit the right to bear arms, but provides that they shall not be worn in a manner dangerous to the welfare of society."); see also *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886) ("The right of the legislature to prohibit the wearing of concealed weapons, under state constitutions in many respects like our own, is now generally conceded.").

<sup>121</sup> See *State v. Burgoyne*, 75 Tenn. 173, 174, 179 (1881) (sustaining a conviction for the sale of pistols post-Fourteenth Amendment ratification); *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 159 (1840) (finding only militia weapons to be free from state regulation).

<sup>122</sup> See *State v. Speller*, 86 N.C. 697, 700–01 (1882) (sustaining a conviction for carrying a concealed weapon, even though the purpose of carrying the weapon was self-protection).

<sup>123</sup> See *McMillen v. Steele*, 119 A. 721, 722 (Pa. 1923) (discussing the prohibition of sale of guns to minors).

<sup>124</sup> See *State v. Reid*, 1 Ala. 612, 621–22 (1840) (upholding a law banning concealed weapons because only weapons that were carried openly served the purpose of defending a person and the state).

<sup>125</sup> See *English v. State*, 35 Tex. 473, 478–79 (1872) (discussing the legislature's right to regulate the privilege granted by the Second Amendment).

<sup>126</sup> See *Commonwealth v. Murphy*, 44 N.E. 138, 138 (Mass. 1896) (upholding a law prohibiting the non-militia-affiliated marching and drilling with firearms post-Fourteenth Amendment ratification).

<sup>127</sup> See, e.g., *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942) ("The right to keep and bear arms is not a right conferred upon the people by the federal constitution. Whatever rights in this respect the people may have depend upon local legislation; the only function of the Second Amendment being to prevent the federal government and the federal government only from infringing that right."); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269–70 (7th Cir. 1982) (holding that the Second Amendment does not apply to the states).

perfectly legal.<sup>128</sup> As the Third Circuit noted in 1942:

Weapon bearing was never treated as anything like an absolute right by the common law. It was regulated by statute as to time and place as far back as the Statute of Northampton in 1328 and on many occasions since. The decisions under the State Constitutions show the upholding of regulations prohibiting the carrying of concealed weapons, prohibiting persons from going armed in certain public places and other restrictions, in the nature of police regulations . . . .<sup>129</sup>

These regulations were routinely upheld despite the ratification of the Fourteenth Amendment.<sup>130</sup> Whatever its protection against federal encroachment, until 2010, the Second Amendment was impotent against challenges to state regulations.<sup>131</sup>

History changed dramatically in 2008 and 2010 when the Supreme Court provided a decidedly modern interpretation to the Second Amendment.<sup>132</sup> Gone is any reliance on the Statute of Northampton, a fourteenth-century law prohibiting English citizens from going or riding “armed by night or by day, in Fairs, Markets, nor in the presence of Justices or other Ministers.”<sup>133</sup> We are no longer damned to retain the legacy of an English Bill of Rights that disarmed the Catholics, who had first disarmed the Protestants, noting that “the subjects which are Protestants, may have arms for their defense *suitable to their conditions*

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<sup>128</sup> See *United States v. Tot*, 131 F.2d 261, 266–67 (3d Cir. 1942) (“[T]his amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power.”), *rev’d*, 319 U.S. 463 (1943). The most notable exception, *Bliss v. Commonwealth*, 2 Litt. 90 (Ky. 1822), was considered by nearly every state court to be a remarkable outlier. See, e.g., *State v. Keet*, 190 S.W. 573, 574–75 (Mo. 1916) (“[*Bliss*] has never been cited with approval, but has often been disapproved.”); *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 160 (1840) (“We are aware that the court of appeals of Kentucky, in the case of *Bliss v. Commonwealth* . . . [decided that legislation which prohibited concealed weapons] is unconstitutional and void. We have great respect for the court by whom that decision was made, but we cannot concur in their reasoning.”).

<sup>129</sup> *Tot*, 131 F.2d at 266.

<sup>130</sup> See, e.g., *Quilici*, 695 F.2d at 269–70 (holding that the right to keep and bear arms is so limited by a state’s police power that a ban on handguns did not violate the right).

<sup>131</sup> See, e.g., *id.* (holding that the Second Amendment does not apply to the states and the state is free to regulate gun laws using its police power).

<sup>132</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (holding that the Second Amendment confers an individual right to keep and bear arms); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (holding that the right to keep and bear arms is applicable to the states by virtue of the Fourteenth Amendment).

<sup>133</sup> Ehrman & Henigan, *supra* note 50, at 8.

and as allowed by law.”<sup>134</sup> We are now free to recognize that the historical model, built on muskets and militias, is unworkable and can transition to a Constitution that promises individual protections and freedoms through a vibrant, nearly fully incorporated Fourteenth Amendment. The time is ripe for us to break free from an uncertain history that has proven ill-equipped to meet the needs of its twenty-first-century citizens keeping and bearing twenty-first-century weaponry.

Article V, which outlines the constitutional amendment process, permits us to modernize our constitutional approach toward weaponry without doing injustice to our history.<sup>135</sup> We can accept the truth that what was relevant for colonial America is no longer relevant for us today, particularly after ratification of the Fourteenth Amendment. We do not rely on militias. We do not own muskets or slaves. Women have secured the right to work and vote. Individual rights and freedoms “emanate” from the “penumbras” of our brilliant Constitution,<sup>136</sup> though those emanations continue to be first articulated by our Supreme Court. This ability to “expound” individual rights is not found directly in any portion of our Constitution but continues to find its source in judicial review, with rights being enlarged or constricted often based upon the composition of the Supreme Court and its view of history.<sup>137</sup> Our modern world is struggling with the Second Amendment, but not because we do not understand what it

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<sup>134</sup> *Id.* at 9 (emphasis added) (quoting 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 43 (1971)); *see also id.* (“[T]here is little historical support for the idea that the English Bill of Rights was attempting to ensure some absolute right of individuals to have arms. Instead, the focus of this section of the Bill of Rights was a conflict between Protestants and Catholics over respective roles in the militia and the army.”).

<sup>135</sup> *See* *Schneiderman v. United States*, 320 U.S. 118, 137 n.15 (1943) (“Writing in 1816 Jefferson said: ‘Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of bookreading; and this they would say themselves, were they to rise from the dead. I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.’” (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 37, 42–43 (Paul Leicester Ford ed., 1899))).

<sup>136</sup> *See* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (writing that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”). *Griswold* opened the door to a new era of “individual rights” that continues to grow, even to this day. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>137</sup> *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

meant. Rather, we are struggling because we do not know, constitutionally-speaking, how to properly modernize its application. This author would urge that we forego the continuing historical debates, accept the Second Amendment's fallibilities, and create a more workable solution using Article V's proffered tool. The time has come to take control of our destiny to ensure continued gun ownership by lawful gun owning citizens. Relying upon statutes from the fourteenth century as a basis for assessing whether a twenty-first-century individual may own weaponry for his or her defense seems absurd, particularly in light of the transformative impact the Fourteenth Amendment has had, and continues to have, on our Constitution. The Founders knew we would arrive at this juncture.<sup>138</sup> They prepared a path in Article V—firmly entrenched within the words of the Constitution.<sup>139</sup> Article V gave us the Bill of Rights and the imperative Fourteenth Amendment. Let us once again utilize Article V to create a workable solution that is not beholden to the "standard model" or the historians. Let us build on the presumption that law-abiding citizens have a right to arms and a right to self-defense. Let us not allow this individual right be subject to judicial reconsideration. Let us create an amendment that serves the rights American citizens have fought long and hard to secure, without fear of any changes in Supreme Court membership.

*C. The Text of Any Amendment Must Protect the Right of Law-Abiding Individuals to Own and Use Guns*

It has been said that history repeats itself. So, as we prepare to move forward and strengthen our Second Amendment, it is important to consider how the Framers approached their task.<sup>140</sup> Granted, there will be vital distinctions between the path we select today and the paths that opened up in the late 1700s. But, we can learn from the Founders that what we put into our new amendment may be every bit as important as what we leave out. A brief, textual analysis of the Second Amendment sheds important light on how we should move ourselves forward.

Our Founders were acutely aware of the need to add a Bill of Rights to constrain the federal government from the encroachments on individual

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<sup>138</sup> See Letter from Thomas Jefferson to Samuel Kercheval, *supra* note 135 ("As [the human mind] becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.").

<sup>139</sup> See Ralph R. Martig, *Amending the Constitution, Article Five: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1253–61 (1937) (discussing the history leading up to the drafting of Article V).

<sup>140</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 652 (2008) (Stevens, J., dissenting) ("The proper allocation of military power in the new Nation was an issue of central concern for the Framers. The compromises they ultimately reached, reflected in Article I's Militia Clauses and the Second Amendment, represent quintessential examples of the Framers' 'splitting the atom of sovereignty.'").

states.<sup>141</sup> The English experience foretold a need to curtail royal prerogative and federal power. Thus, when the Founders gathered to begin drafting our Bill of Rights, their primary goal was to limit federal power, not engorge individual freedoms.<sup>142</sup> The goal was to improve the Articles of Confederation and its weak federal government while simultaneously continuing a states' rights approach that would permit the variances of slavery and northern living.

The Founders were certainly schooled in state constitutional rights, rights whose declarations regarding arms were often much more clearly written and focused on the broader individual right to protect oneself and community.<sup>143</sup> The Founders knew the value of states' rights. But, in the federalism experiment, the Founders believed that perpetuating state militias was the surest guard against standing armies.<sup>144</sup> As Saul Cornell notes, "America's first great charter of liberty, the Virginia Declaration of Rights, made no mention of the right to bear arms. It did, however, assert the necessity of a well-regulated militia."<sup>145</sup> In fact, Thomas Jefferson initially proposed a broad right to own and use weaponry that was rejected in the Virginia Declaration of Rights in favor of George Mason's militia-based protection.<sup>146</sup> This militia focus embraced a distinctively colonial value.<sup>147</sup>

In contrast to the Virginia approach, the Pennsylvania Declaration of Rights, described as an outlier by one scholar,<sup>148</sup> protected quite explicitly

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<sup>141</sup> See Finkelman, *supra* note 92, at 197 ("The Federalists . . . offer[ed] a series of amendments that, for the most part, recognized existing limitations on the national government under the new Constitution.").

<sup>142</sup> See Rakove, *supra* note 70, at 161–62 ("The debate over a bill of rights . . . was about limiting the powers of the proposed national government, not trenching further on the traditional police responsibilities of the states.").

<sup>143</sup> See Amar, *supra* note 33, at 104 ("[S]tate constitutions in 1789 consistently used the phrase 'bear arms' in military contexts and no other.").

<sup>144</sup> See *Heller*, 554 U.S. at 637 (Stevens, J., dissenting) ("The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States."); see also *id.* at 651 ("When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia.").

<sup>145</sup> Cornell, *supra* note 99, at 573.

<sup>146</sup> *Id.* at 574.

<sup>147</sup> See *id.* at 572 ("Eighteenth-century ideas about the right to bear arms reflected the realities of the colonial experience. The militia provided colonists with a means of protecting themselves from external threats and served as a means of preserving public order against the danger of insurrection.").

<sup>148</sup> See *id.* at 578 ("The focus on the Pennsylvania Constitution by modern gun rights advocates seems ironic given that the Pennsylvania Constitution of 1776 was derided by many within the Founding generation, a fact that led Pennsylvanians to cast it aside within a generation of adopting it.").

the “right to bear arms for the defence of themselves and the state.”<sup>149</sup> Sometime thereafter, Massachusetts sought to protect a similar right in securing the “right to keep and bear arms for the common defense.”<sup>150</sup> But, as noted constitutional scholar Akil Amar reminds, modern observers struggle with a clear understanding of eighteenth-century text because “[w]hen we turn to state constitutions, we consistently find arms-bearing and militia clauses intertwined with rules governing standing armies, troop-quartering, martial law, and civilian supremacy.”<sup>151</sup> Clearly, the Founders world is not our world and our post-Fourteenth Amendment Constitution is not their Constitution.

The Founders did not write on a clean slate, one unaffected by history or governing laws. And neither will we. The Founders were certainly aware of the English militia history beginning with the twelfth-century Assize of Arms.<sup>152</sup> They were raised on the notion that a militia, rather than a standing army, provided the truest guard against the tyranny of the State.<sup>153</sup> The Founders would have appreciated the distinctions provided by the Virginia Declaration of Rights, the Pennsylvania Declaration of Rights, and the various existing state constitutions.<sup>154</sup> The language chosen was most assuredly purposeful, drawn from current experience and existing documents. As one scholar notes, “Congress was certainly on notice that demands for explicit protections of [individual] rights were on the table and could easily have put such language” into the Second Amendment.<sup>155</sup> The choices made were informed and deliberate, but made at a time when individual rights were not as highly valued for all citizens as they are today.<sup>156</sup> The distinct manner of drafting the right sought to be protected existed in Pennsylvania and other states and would have been

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<sup>149</sup> *Id.* at 573. But, this same Constitution safeguarded the right to hunt in a separate provision from the right to “bear arms,” which Cornell suggests merits further analysis regarding the individual versus civic right protected by the Pennsylvania Constitution’s “right to bear arms.” *Id.* at 581.

<sup>150</sup> *Id.* at 573.

<sup>151</sup> Amar, *supra* note 33, at 106.

<sup>152</sup> Ehrman & Henigan, *supra* note 50, at 10.

<sup>153</sup> *See id.* at 10–11 (detailing the various English struggles between Kings, Parliament, and citizens involving tension between the standing armies and militia rule).

<sup>154</sup> Finkelman, *supra* note 92, at 208–12, 231–32. The Pennsylvania minority approach is cited by many of the “standard model” scholars as proof that the Second Amendment establishes an individual right. While that may have been true within the borders of Pennsylvania, it was most assuredly an approach that was actively rejected by the Founders in the ultimate drafting of the Second Amendment. *See id.* at 231–32 (discussing the Pennsylvania Constitution of 1776 in comparison to the Second Amendment).

<sup>155</sup> *Id.* at 212.

<sup>156</sup> *See id.* (“The fact that Madison and Congress did not propose amendments along the lines demanded by the Pennsylvania minority leads to a *prima facie* conclusion that they did not intend to incorporate such protections into the Bill of Rights.”).

well known to those participating in the constitutional process.<sup>157</sup>

Madison's original phrasing presents the strongest possible claim for an individual right—limited but at least more akin to our modern understanding—to bear arms. This first draft read:

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.<sup>158</sup>

This initial presentation, however, did not survive long. The House Committee responsible for reviewing the amendments made three significant changes to Madison's draft language.<sup>159</sup> First, the Committee moved the militia language ahead of the right to "keep and bear arms."<sup>160</sup> Second, the Committee removed the semicolon in the first sentence and, instead, inserted a comma.<sup>161</sup> Third, the House Committee further elaborated what was meant by a well-regulated militia, referring to "the body of the people."<sup>162</sup> It bears emphasizing that the eighteenth-century understanding of "the people" never meant *all* the people in its literal sense. In our pre-Fourteenth Amendment society, "the body of the people" referred solely to portions of the white male population.<sup>163</sup>

<sup>157</sup> See *id.* at 209 (highlighting the comprehensive language used in the Antifederalists' *Reasons of Dissent*, which "underscore[d] the connection many Antifederalists saw between state sovereignty and the control of the state militia").

<sup>158</sup> Rakove, *supra* note 70, at 120 (quoting THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (Neil H. Cogan ed., 1997)) (internal quotation marks omitted).

<sup>159</sup> *Id.* at 121–22.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* While it is nearly impossible to appreciate what the House Committee intended by removing the semicolon and replacing it with a comma, Professor Rakove presents the most probable explanation of transposing the first two "rights" and then connecting these with a comma rather than semicolon:

[I]f the semicolon in Madison's original resolution could be read as stating two distinct rights, not one, its replacement by a comma would seem to connect the two members of the Amendment more closely; that is, it would link the preamble and the right more intimately than had been the case before, and thereby tie the right of arms bearing to the institution of the militia.

*Id.* at 126.

<sup>162</sup> *Id.* at 122.

<sup>163</sup> *Id.* at 108. Rakove provides a very critical observation regarding originalist constitutional interpretation, namely, that the proper originalist approach toward the militia requires acceptance that:

[T]he concept of the militia had a fixed and consensually accepted meaning in ordinary usage, so that it was essentially coterminous with the free adult male population physically capable of bearing arms; and if the language of the Constitution is not to be rendered completely plastic, modern interpretation has to preserve that meaning.



Thus, when the official Second Amendment text was proffered in the House, it read as follows: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."<sup>164</sup>

This original phrasing contains a clear emphasis on the duty, during the eighteenth century, of "the body of the people" to supply the first line of communal defense.<sup>165</sup> The goal was to diffuse the Antifederalists fears regarding the continuing viability of militias.<sup>166</sup> At the same time, Madison wanted to ensure that those harboring religious objections to participating in militia duty would be protected against compelled service. This improved version, however, would not survive in the Senate. Instead, the Senate ultimately settled on the Amendment's current language: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>167</sup>

"Perhaps no provision in the Constitution causes one to stumble quite so much on a first reading, or second, or third reading, as the short provision in the Second Amendment of the Bill of Rights."<sup>168</sup> What remains clear, however—to the extent any clarity can be obtained from eighteenth-century writings—is that the Founders were surely aware that they had numerous options from which to choose when drafting the Second Amendment.<sup>169</sup> The Latin phrase, *expressio unius est exclusion alterius* should be conceded in measuring the final version of our Second Amendment.<sup>170</sup> The Founders knew that certain existing state constitutions

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*Id.*

<sup>164</sup> Finkelman, *supra* note 92, at 226 (quoting 1 ANNALS OF CONG. 749 (1789) (Joseph Gales ed., 1834)) (internal quotation marks omitted).

<sup>165</sup> See Merkel, *supra* note 35, at 688 ("[The eighteenth-century] right to arms was thus not only more civic than privatistic, it also happily existed alongside a wide array of regulations and restrictions pertaining to arms possession and use.").

<sup>166</sup> See *id.* at 680–81 ("Many of the founders, and more of the Anti-Federalists, who agitated for a Bill of Rights, preferred that the nation place its first reliance on local citizen militia rather than professional soldiery." (footnote omitted)).

<sup>167</sup> U.S. CONST. amend. II.

<sup>168</sup> William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1236 (1994).

<sup>169</sup> See Finkelman, *supra* note 92, at 207–12 (describing the content of the Antifederalist's "proposed amendments concerning the army, the militia, the right to bear arms, and the right to hunt," which were ultimately excluded from the Second Amendment). In particular, Professor Finkelman notes that the Pennsylvania delegation, often highlighted by the "standard model" scholars, proposed three amendments to the Constitution solely relating to gun ownership and military matters. *Id.* at 207. Clearly included in these three "gun rights" proposals were amendments to secure "the right of self-protection through the ownership of weapons . . . [and] the right to hunt and fish." *Id.* Only those proffered amendments speaking to the militia were ultimately enveloped in the Bill of Rights.

<sup>170</sup> Chief Justice Marshall embraced this same concept in *Marbury v. Madison* when he reminded:

contained clauses guaranteeing an individually focused right of self-defense.<sup>171</sup> The Founders knew that existing state constitutions tethered the right to keep or bears arms to both individual and communal defense, something uniquely experienced in eighteenth-century America, but declined to embrace a broader individual rights model.<sup>172</sup> This is not to suggest that such individual right cannot be found, modernly, in the Second Amendment. Such individual right – though currently limited to permitting a handgun for the protection of one's self in the home – has indeed been found. This history is provided to underscore that our modern "rights-based" Constitution is a vastly different Constitution from the one ratified in 1788.

Textually, it is impossible to ignore the militia focus of the Second Amendment.<sup>173</sup> "The draft language suggests that the framers saw this essentially as an amendment connected to the militia; any right to own weapons was a collective right, derived from the right of each state to maintain a 'well regulated militia.'"<sup>174</sup> As Akhil Amar observes:

[P]rotection against thugs and pirates was not the main image of the Second Amendment at the Founding. The amendment was about Lexington, Concord, and Bunker Hill. When arms were outlawed, only the king's men would have arms. The amendments forged in the afterglow of the Revolution reflected obvious anxiety about a standing army controlled by the new imperial government, and affection for the good

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Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all. It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

5 U.S. (1 Cranch) 137, 174 (1803).

<sup>171</sup> Professor Finkelman quotes two of the proposed Pennsylvania Amendments. Number Seven called for broad gun ownership "for the defense of themselves and their own state . . . or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed," and Number Eight sought to protect the "liberty to fowl and hunt in seasonable times." Finkelman, *supra* note 92, at 208. Both recommendations were plainly discarded in the drafting of the Second Amendment, which omits any clearly stated individual right to own a weapon or protect the right to hunt or fowl.

<sup>172</sup> See Finkelman, *supra* note 92, at 231 ("The fact that Madison refused to adopt such [individual rights-based] language—and that Congress did not amend the proposal to add such language—suggests that the Federalists who were in control of Congress in 1789 did not intend to create an individual right.").

<sup>173</sup> See *id.* at 208 ("By seeing what the framers of the Second Amendment *did not do*, we can better understand what they did do."). In interpreting the Second Amendment, Professor Finkelman advocates a very logical approach: "[I]t is useful to consider what Congress might have written, but did not." *Id.*

<sup>174</sup> *Id.* at 226.

old militia.<sup>175</sup>

However, the “legal and social structure upon which the [Second Amendment] is built no longer exists.”<sup>176</sup> Whatever relevance the militia may have held two centuries ago has vanished just as quickly as the musket and flintlock. Modern Americans struggle to appreciate the transposition of a standing army and militia as we depend upon, and embrace, our modern military to an extent that would, and in fact did, alarm the Founders.<sup>177</sup> Our patriotism was their heresy.

Thus, we are faced with the dilemma of clinging to an Amendment that evokes controversy without adequately protecting the individual rights springing forth from our Constitution. The Founders’ Second Amendment is vastly distinct from our Second Amendment. The eighteenth-century militia is a historic relic. Such world-view has been extinguished by massive standing armies, nuclear and chemical weaponry, and technological advances that permit a soldier sitting in the United States or elsewhere to send a drone thousands of miles away without ever herself facing physical danger.<sup>178</sup> While the fear of tyranny still exists, the fear of a standing army—particularly our great military—does not.

We have become so removed in time and experience from the Founding generation that it seems naïve to continue to rely upon their defense model. We have professional police forces. We have an extensive standing army, perhaps the greatest military in the world. We have laws that permit individuals to stand their ground and carry concealed weapons. We recognize a right of self-defense regardless of race, gender, or national origin.<sup>179</sup> In short, our world has radically transformed from the world encountered by our Founders. Why, then, should our Second Amendment as currently constructed continue to endure, weathering what will surely become constitutional storm after storm? Why risk the rights of lawful gun owners to own and use their weapons? Why not use the tools that were left for us when facing such a situation—a change in times and focus? Why not return power to the state legislatures where individuals, through local

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<sup>175</sup> Amar, *supra* note 33, at 109.

<sup>176</sup> *Id.* at 106.

<sup>177</sup> See *id.* at 108 (“At the Founding, a standing army in peacetime was viewed with dread and seen as Others—mercenaries, convicts, vagrants, aliens—rather than ordinary citizens. Today, we view our professional armed forces with pride.”).

<sup>178</sup> See Finkelman, *supra* note 92, at 209 (“We might argue today about what sort of weapons are protected [by the Second Amendment]. It is not clear that such provisions would today protect the private ownership of Saturday night specials, assault rifles (however Congress might define them), submachine guns, sawed-off shotguns, bazookas, or flamethrowers. But, whatever fell in or out of the protected arena, the constitutional principle of private ownership of weapons would have been clear. Had Congress added these provisions to the Bill of Rights, we would also have a very different country than we have today, assuming, of course, that we still would have a country.”).

<sup>179</sup> See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

democracy, have a voice in the interpretation, and creation, of gun regulations? Why not Article V?

#### IV. THE SECOND AMENDMENT COMES OF AGE

"Scarcely any *political question* arises in the United States . . . that is not resolved, sooner or later, into a *judicial question*."<sup>180</sup> In 2008, the U.S. Supreme Court broke its nearly seventy-year silence regarding the Second Amendment.<sup>181</sup> Not since the 1930s, when the Court had limited the Second Amendment to communal militia service, had the Court reconsidered its unaltered interpretation.<sup>182</sup> And, with few notable exceptions, courts reviewing the right to keep and bear arms ruled that the Founders intended a constrained right to arms generally, if not exclusively, attached to militia service. It was inconsequential whether the question involved weaponry (only weaponry connected to militia service was protected)<sup>183</sup> or activity (only activity relating to militia service was protected);<sup>184</sup> courts universally gave a very limited view of the Framers' intentions. There was a clear and consistent pattern: the right to keep and bear arms was not a free-standing individual right but unequivocally conjoined with militia service.<sup>185</sup>

The winds of change began to blow when Justice Thomas authored a concurring opinion in *Printz v. United States*.<sup>186</sup> *Printz* addressed the constitutionality, under the Tenth Amendment, of the Brady Act, a federal gun law that required local law enforcement to perform background checks on gun purchasers during the interim period before the national instant

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<sup>180</sup> Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385, 385 (1969) (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (Phillips Bradley ed., 1945)) (internal quotation marks omitted).

<sup>181</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>182</sup> *See United States v. Miller*, 307 U.S. 174, 178 (1939) ("The Constitution as originally adopted granted to the Congress power . . . '[t]o provide for organizing, arming, and disciplining, the Militia . . . reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.'" (quoting U.S. CONST. art. I, § 8)).

<sup>183</sup> *See id.* ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." (quoting *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840))).

<sup>184</sup> *See Presser v. Illinois*, 116 U.S. 252, 265 (1886) ("It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States . . .").

<sup>185</sup> *See Miller*, 307 U.S. at 178 ("With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.").

<sup>186</sup> 521 U.S. 898 (1997).

background check became operational.<sup>187</sup> Justice Scalia, writing for the majority, found the law violated federalism principles by improperly commandeering local law enforcement to administer a federal program.<sup>188</sup> The Second Amendment was neither argued nor litigated, but it nonetheless came of age in this opinion.<sup>189</sup> Justice Thomas's dicta proved a harbinger of things to come:

Even if we construe Congress' authority to regulate interstate commerce to encompass those intrastate transactions that "substantially affect" interstate commerce, I question whether Congress can regulate the particular [gun purchase] transactions at issue here. The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority. . . . The Second Amendment similarly appears to contain an express limitation on the Government's authority. That Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. . . . Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic."<sup>190</sup>

Prior to Justice Thomas's concurrence, the only changes between the Court's 1939 opinion in *United States v. Miller*<sup>191</sup> and 2008 appeared to be an increased scholarly push toward adopting the individual rights model<sup>192</sup>

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<sup>187</sup> *Id.* at 902.

<sup>188</sup> *See id.* at 933 ("The Federal Government may not compel the States to enact or administer a federal regulatory program.' The [Brady Act's] mandatory obligation imposed on [state law enforcement officers] to perform background checks on prospective handgun purchasers plainly runs afoul of that rule." (quoting *New York v. United States*, 505 U.S. 144, 188 (1992))).

<sup>189</sup> *See id.* at 938-39 (Thomas, J., concurring) ("As the parties did not raise this [Second Amendment] argument . . . we need not consider it here.").

<sup>190</sup> *Id.* at 937-39 (Thomas, J., concurring) (citations omitted).

<sup>191</sup> 307 U.S. 174 (1939).

<sup>192</sup> *See Ehrman & Henigen, supra* note 50, at 6 ("The argument that the constitution is a barrier to stronger gun laws has received support in recent years from articles appearing in various legal

and a conservative shift in the Court's membership.<sup>193</sup> In fact, in 1983, the Supreme Court denied certiorari in a case nearly identical to *McDonald v. Chicago*.<sup>194</sup> At that time, not a single Justice felt the need to revisit *Miller* or overturn the Seventh Circuit's holding that "[b]ecause the *second amendment* is not applicable to [the states] and because possession of handguns by individuals is not part of the right to keep and bear arms, [the Morton Grove Ordinance did] not violate the *second amendment*."<sup>195</sup> Instead, the Supreme Court in a single sentence denied review.<sup>196</sup> *Miller* was still the law of the land.

Between 1983 and 1997, when *Printz* was decided, the Supreme Court's composition changed dramatically. Six new Justices would join the Court. The first change was the appointment of Associate Justice Antonin Scalia.<sup>197</sup> The next appointment was Associate Justice Anthony Kennedy, who, like Justice Scalia, was appointed by Republican President Ronald Reagan.<sup>198</sup> The next two Justices, appointed by Republican President George Herbert Walker Bush, were Associate Justices David Souter and Clarence Thomas, respectively.<sup>199</sup> Finally, Democratic President William Jefferson Clinton appointed two new members to the Court, Associate Justices Ruth Bader Ginsburg and Stephen Breyer.<sup>200</sup>

The appointment of these six new Justices changed two-thirds of the Court's membership. Thus, it is not surprising that this new combination would prompt significant constitutional changes. The most noteworthy

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publications which conclude that the second amendment guarantees a broad, individual right to own firearms for lawful private purposes in the same way that the first amendment guarantees individual rights of free speech, religion, and assembly." Ehrman and Henigen's article even predates the plethora of recent scholarship, including that which is self-described as the "standard model" mantra.

<sup>193</sup> See Merkel, *supra* note 35, at 697 (predicting, in 2006, that the appointment of Justices Roberts and Alito would "make it more likely, perhaps all but certain, that a definitive Supreme Court opinion guaranteeing a private right to arms under the Second Amendment [would] issue within a few years"). With the Court's decisions in *Heller* and *McDonald*, Merkel's prescient forecast came true both in time and substance. Former Chief Justice Rehnquist warned against such a "living Constitution" approach, reminding that the nature of the Constitution "was designed to enable the popularly elected branches of government, *not the judicial branch*, to keep the country abreast of the times." Rehnquist, *supra* note 1, at 699 (emphasis added). Perhaps Justice Rehnquist's reluctance to modernize gun rights explains why the Roberts Court, rather than the Rehnquist Court, first took up the issue.

<sup>194</sup> *Quilici v. Village of Morton Grove*, 464 U.S. 863 (1983).

<sup>195</sup> *Quilici v. Village of Morton Grove*, 695 F.2d 261, 271 (7th Cir. 1982) (emphasis added).

<sup>196</sup> *Quilici*, 464 U.S. 863.

<sup>197</sup> Justice Scalia took his judicial oath of office on September 26, 1986. *Biographies of Current Justices of the Supreme Court*, SUPREME CT. U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Jan. 26, 2014).

<sup>198</sup> Justice Kennedy took his judicial oath of office on February 18, 1988. *Id.*

<sup>199</sup> Justice Souter took his judicial oath of office on October 9, 1990. Justice Thomas took his judicial oath of office on October 23, 1991. *Id.*

<sup>200</sup> Justice Ginsburg took her judicial oath of office on August 10, 1993. Justice Breyer took his judicial oath of office on August 3, 1994. *Id.*

change, in relation to the Second Amendment, was Justice Thomas's revitalization of the previously discarded individual rights view.<sup>201</sup> Justice Thomas captured much of the burgeoning "standard model" scholarship in his *Printz* footnote: "Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right."<sup>202</sup> Justice Thomas, deliberately or not, galvanized the Second Amendment's rebirth.

A mere twelve years later, Justice Thomas and the "standard model" would prevail in a much more meaningful decision. In 2008, the Supreme Court in *District of Columbia v. Heller* veered far from an originalist approach and nearly two centuries of jurisprudence in finding the Second Amendment's "central" protection was the individual right to maintain a handgun in the home for personal self-defense purposes.<sup>203</sup> This holding is remarkable when one considers the nearly uninterrupted history of courts, both state and federal, finding that the "central" focus of the Second Amendment was militia service and militia weaponry.<sup>204</sup> Handguns would have been unknown to the Founders whose world was dominated—at least from the modern perspective—by antiquated weaponry that was large and clumsy and required gunpowder and musket balls for operation.<sup>205</sup> And, to aid in "self-defense," colonial America preferred disarmament and proscriptions against weaponry as opposed to arming the entire populace.<sup>206</sup>

Cases prior to *Heller* routinely considered the Second Amendment limited, at its core, to military weaponry connected to militia service.<sup>207</sup> Self-defense was never considered by eighteenth-, nineteenth-, or twentieth-century courts to be a motivating feature, or core purpose of the Second Amendment.<sup>208</sup> Thus, Justice Scalia's rejection of originalism is

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<sup>201</sup> *Printz v. United States*, 521 U.S. 898, 937–39 (1996) (Thomas, J., concurring).

<sup>202</sup> *Id.* at 938 n.2.

<sup>203</sup> *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

<sup>204</sup> See Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 3 (2000) ("If there is such a thing as settled constitutional law, the Second Amendment may have been its quintessential example."); see also Farber, *supra* note 46, at 180 ("Justice Scalia has also stressed stare decisis as a limit on originalism. Despite originalism's centrality in his thinking about judicial review, it plays little role in some of Justice Scalia's most notable opinions.").

<sup>205</sup> See Clayton Cramer, *Colonial Firearms Regulation*, 16 J. FIREARMS & PUB. POL'Y 1, 16 (2004) (discussing colonists' use of muskets in early frontier battles).

<sup>206</sup> See *supra* note Part II.

<sup>207</sup> The one major, and modern, exception was *United States v. Emerson*, which held that the Second Amendment "protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons." 270 F.3d 203, 264 (5th Cir. 2001).

<sup>208</sup> But see Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 623,

notable,<sup>209</sup> particularly in light of his own writing that the only true voice to constitutional interpretation is originalism.<sup>210</sup> Equally troubling is the Court's slim majority opinion that casts a clear deviation from past jurisprudence.<sup>211</sup> What the majority follows is not precedent, but rather,

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641–43 (2012) (discussing different state court treatments of Second Amendment rights in the eighteenth, nineteenth, and twentieth centuries). Professor Merkel expresses frustration:

[T]hose who call themselves originalist (or even textualists), those who base the legitimacy of the interpretation they offer on its alleged fidelity to a past understanding, place themselves under an obligation to advance an account of that past understanding that is not demonstrably counter-factual, naïve, or absurd, and that this holds whether one's perspective is essentially elitist (framer-focused) or popular (We the People-focused).

Merkel, *supra* note 35, at 686.

<sup>209</sup> See Honorable Antonin Scalia, *Constitutional Interpretation the Old Fashioned Way*, Remarks at the Woodrow Wilson International Center for Scholars (Mar. 14, 2005), available at [http://cfif.org/htdocs/legal\\_issues/legal\\_updates/us\\_supreme\\_court/scalia-constitutional-speech.htm](http://cfif.org/htdocs/legal_issues/legal_updates/us_supreme_court/scalia-constitutional-speech.htm) (discussing his rejection of the label “strict constructionist”). In his comments, Justice Scalia explains what “originalism” means:

I am one of a small number of judges, small number of anybody—judges, professors, lawyers—who are known as originalists. Our manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people.

*Id.* Scalia was quite direct in explaining how non-originalist judges previously explained their deviation from originalism: “[P]rior to the advent of the ‘Living Constitution,’ judges did their distortions the good old fashioned way, the honest way—they lied about it. They said the Constitution means such and such, when it never meant such and such.” *Id.* These comments appear rather ironic following the Court's holding in *Heller*, which most historians (the individuals Justice Scalia usually informs us are best suited to aid in interpretations) reject on historical grounds. See Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1112–13 (2009) (rejecting the claim that historical evidence shows that the forefathers supported an individual rights component to the Second Amendment).

<sup>210</sup> See, e.g., Winkler, *supra* note 90 (discussing Scalia's embrace of a living Constitution in *Heller*).

<sup>211</sup> Every federal circuit, except the Second and Fifth Circuits, had found that the Second Amendment protected a collective right for individuals relating to militia service. See *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (“[T]he *Miller* Court assigned no special importance to the character of the weapon itself, but instead demanded a reasonable relationship between its ‘possession or use’ and militia-related activity.” (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939))); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995) (“[T]he lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right.”); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (“It is clear that the Second Amendment guarantees a collective rather than an individual right.”); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (“[U]nder the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia.”); accord *United States v. Haney*, 264 F.3d 1161, 1165–66 (10th Cir. 2001) (rejecting, like previous 10th Circuit panels, the “time worn” challenge to felon in possession statutes because no federal criminal gun-control could be said to violate the Second Amendment unless it “impair[s] the state’s ability to maintain a well-regulated militia”); *United States v. Napier*, 233 F.3d 394, 403 (6th Cir. 2000) (“Recent scholarship, however, does not provide a sufficient basis for overruling an earlier



the burgeoning scholarship calling for an individual right to “keep and bear arms.” This type of analysis, embracing the “living Constitution,” is precisely the analytical framework that the *Heller* five-member majority would usually reject and ridicule.<sup>212</sup> But, in fairness, the dissent embraces an anti-individual rights approach that is unfamiliar to their usual jurisprudence. *Heller* clearly demonstrates the mischief that can occur when nine unelected Justices are permitted to define, or delimit, the individual rights emanating from the penumbras of the Constitution.

A similar dilemma is posed by the Court’s 2010 plurality decision in *McDonald v. City of Chicago*.<sup>213</sup> For the first time, the Court found the Second Amendment was intended to be fully incorporated to apply to the individual states.<sup>214</sup> While four members of the Court found the right incorporated under Due Process,<sup>215</sup> Justice Thomas would have expanded application of the right through the Privileges and Immunities Clause.<sup>216</sup>

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decision of this Court.”); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999) (“Whatever questions remain unanswered, *Miller* and its progeny do confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia.”); *United States v. Wright*, 117 F.3d 1265, 1272 (11th Cir. 1997) (“[I]n order to claim Second Amendment protection, Wright must demonstrate a reasonable relationship between his possession of the machineguns and pipe bombs and ‘the preservation or efficiency of a well regulated militia.’” (quoting *Miller*, 307 U.S. at 178)); *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996) (“We follow our sister circuits in holding that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen.”); *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992) (“Considering this history, we cannot conclude that the Second Amendment protects the individual possession of military weapons . . . . The rule emerging from *Miller* is that, absent a showing that the possession of a certain weapon has ‘some reasonable relationship to the preservation or efficiency of a well-regulated militia,’ the Second Amendment does not guarantee the right to possess the weapon.” (quoting *Miller*, 307 U.S. at 178)); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (“Defendant presents a long historical analysis of the amendment’s background and purpose from which he concludes that every citizen has the absolute right to keep arms. This broad conclusion has long been rejected.” (citing *Miller*, 307 U.S. 174)).

<sup>212</sup> See Laurence H. Tribe, *Approaches to Constitutional Analysis*, in AM. CONSTITUTION SOC’Y FOR LAW & POLICY, IT IS A CONSTITUTION WE ARE EXPOUNDING: COLLECTED WRITINGS ON INTERPRETING OUR FOUNDING DOCUMENT 26 (2009) (discussing the importance of starting with the Constitution’s “original meaning”). Professor Tribe explains “[o]riginal meaning as [a] starting point”:

Regardless of how committed one might be to the notion of the Constitution as fluid and evolving, it seems clear that interpretation of its provisions—or, indeed, of its design—must at least begin with the question of what those provisions, or that design, meant at the time when they were conceived and, later, at the time they became law. Absent some extremely persuasive justification, it would be nonsensical to begin by treating a phrase in the Constitution as meaning one thing when, to those who wrote or ratified or read it at the time, it would have meant something entirely different.

*Id.*

<sup>213</sup> 130 S. Ct. 3020 (2010).

<sup>214</sup> *Id.* at 3026.

<sup>215</sup> *Id.* at 3030–31.

<sup>216</sup> *Id.* at 3058–59 (Thomas, J., concurring in part and concurring in the judgment).

Even casual observers of the Court would recognize *McDonald* as an extremely fractured opinion, with five individual Justices writing opinions amassing 111 total pages.<sup>217</sup> Such opinions, regardless of topic, underscore the reality that many of our individual rights are tenuously held, or upheld, by slim majorities on the Supreme Court. Rather than strengthen *Heller* and a law-abiding individual's right to possess firearms *McDonald* may simply have exposed the fragile nature of existing Second Amendment jurisprudence.

Much like *Heller*, the *McDonald* decision breaks new ground that may be due as much to Court composition as judicial doctrine.<sup>218</sup> The Supreme Court had past opportunities to incorporate the Second Amendment but did not. The most notable of these occasions occurred in 1983 when the Court refused to reconsider *Miller*,<sup>219</sup> *Presser v. Illinois*,<sup>220</sup> and *United States v. Cruikshank*<sup>221</sup> in the Seventh Circuit decision, *Quilici v. Village of Morton Grove*.<sup>222</sup> Many of these past opinions, excepting *Quilici*, would have been much closer and contemporaneous to the ratification of the Fourteenth Amendment than the twenty-first-century cases handed down by a conservative Court.<sup>223</sup> Yet, there is little doubt that a post-Fourteenth Amendment Constitution values individual rights where such rights are integral to liberty and freedom.<sup>224</sup> The starting point for evaluating individual rights begins with history.<sup>225</sup> But, the key inquiry is whether a

<sup>217</sup> *Id.* at 3026 (plurality opinion). The five opinions span 111 pages in the Supreme Court Reporter, which will likely yield even greater density in the forthcoming U.S. Reports. Justice Alito wrote a twenty-five page opinion for the plurality. Justices Scalia (nine pages) and Thomas (thirty-one pages) both authored concurring opinions. And, following their dissents in *Heller*, both Justice Stevens (thirty-three pages) and Justice Breyer (seventeen pages) drafted dissenting opinions in *McDonald*.

<sup>218</sup> Writing for the plurality, Justice Alito explains: "[i]n sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id.* at 3042. Thus, following *McDonald*, individuals are given a substantive due process right to possess weaponry for self-defense purposes subject to the still undefined instances where the right does not exist for everyone.

<sup>219</sup> 307 U.S. 174 (1939).

<sup>220</sup> 116 U.S. 252 (1886).

<sup>221</sup> 92 U.S. 542 (1875).

<sup>222</sup> *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

<sup>223</sup> See, e.g., *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 729 (9th Cir. 1992) ("The Supreme Court . . . has held that the Second Amendment constrains only the actions of Congress, not the states."); *Dabbs v. State*, 39 Ark. 353, 356 (1882) (interpreting the Fourteenth Amendment's application narrowly to the freed slave population and similarly finding no violation of the Fourteenth Amendment's privileges and immunities clause); *Strickland v. State*, 72 S.E. 260, 263 (Ga. 1911) (reminding that the Supreme Court had found—very near in time to the Fourteenth Amendment's ratification—that the Second Amendment "was a restriction upon the power of Congress only").

<sup>224</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (reminding the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests").

<sup>225</sup> *Id.* at 710.

particular right is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."<sup>226</sup>

While history is on the side of case law preceding *Heller* and *McDonald*, a modern individual-rights focused Constitutional paradigm has been building since the Supreme Court's decision in *Griswold v. Connecticut*.<sup>227</sup> Ironically, the opponents of an individual right to bear arms for purposes of self-defense and handgun possession usually align themselves with the more liberal approach to constitutional interpretation and celebrate such individual rights as abortion, same-sex intimacy, and an expansive right to privacy.<sup>228</sup> Yet, in what has become somewhat common for the Court, Justices (and scholars) transpose their usual alliances for a more historically-grounded and legally-narrow interpretive philosophy when the result is politically desirable.<sup>229</sup> When it comes to guns, traditional liberal interpretations were jettisoned by the dissenting Justices in the name of historical fidelity.<sup>230</sup> Such juxtaposition of usual Constitutional interpretation gives this author pause. How can lawful gun owners be certain that a majority of Justice will side with them on larger issues, such as open-carry laws or background checks?

*Heller* and *McDonald* give ample reason to remove the Justices from

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<sup>226</sup> *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

<sup>227</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965)(first espousing a Constitutional "right" of privacy).

<sup>228</sup> See *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting) (explaining that some judges are able to find individual rights in other amendments but fail to find such rights within the Second Amendment). The Ninth Circuit denied a petition to rehear *Silveira* en banc, and the denial contained four dissenting opinions. *Id.* at 568. Judge Kozinski's opinion, much like Justice Thomas's concurring opinion in *Printz*, provided much needed traction for the "individual rights" movement. See *Printz v. United States*, 521 U.S. 898, 938-39 (Thomas, J., concurring) (discussing that, up until that point, the Court had not been presented with the "opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic'"). Judge Kozinski criticized the irony in his liberal colleagues pushing for a narrow view of the Second Amendment by observing that "[j]udges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted." *Silveira*, 328 F.3d at 568 (Kozinski, J., dissenting). He continued, "But, as the panel [below] aptly demonstrates, when we're none too keen on a particular constitutional guarantee, we can be equally ingenious in burying language that is incontrovertibly there." *Id.*

<sup>229</sup> See *Silveira*, 328 F.3d at 569 (Kozinski, J., dissenting) (providing a historical synopsis of disarmament). Judge Kozinski elaborated:

The able judges of the panel majority are usually very sympathetic to individual rights, but they have succumbed to the temptation to pick and choose. Had they brought the same generous approach to the Second Amendment that they routinely bring to the First, Fourth and selected portions of the Fifth, they would have had no trouble finding an individual right to bear arms.

*Id.*

<sup>230</sup> See Levinson, *supra* note 17, at 643, 645-50 (applying Philip Bobbitt's historical modality of constitutional interpretation analysis to the Second Amendment).

the gun-rights equation.<sup>231</sup> Following these decisions we are left with no clear constitutional standard of review, no clear explication of the Second Amendment's parameters, and no clear juridical basis for the Court's respective holdings. *Heller* tells us that despite the clarity of language and purpose in the prefatory clause, the "well regulated militia" was never intended to be the "central" purpose of the Second Amendment.<sup>232</sup> *McDonald* informs us that despite *Presser* and *Cruikshank*'s proximity to the Fourteenth Amendment, the modern incorporation doctrine demands the Second Amendment be applied to the states as a fundamental right.<sup>233</sup>

Perhaps the rights of the people, with both "rights" and "people" being now far more broadly construed than during the colonial period, should be reconsidered. Our constitutional approach to rights, whether they be gun rights or abortion rights, are too far removed from the Founders' world to credibly interpret either their original intent or textual objectives. And, the Fourteenth Amendment, completely unknown to the Founders, has transformed our entire Constitutional democracy. The time has come for a new approach, one that the Founders provided to allow for a living

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<sup>231</sup> See, e.g., Glenn Harlan Reynolds, *Second Amendment Penumbra: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 247 (2012) (remarking, two years after *McDonald* and only four years after *Heller*, that the Second Amendment "is now part of 'normal constitutional law,' which is to say that discussion about its meaning has moved from the question of whether it means anything at all, to a well-established position that it protects an individual right, and is enforceable as such against both states and the federal government" (emphasis added) (footnote omitted)). It is remarkable that less than five years after the Court completely changed course on an extremely settled Second Amendment interpretation, an esteemed constitutional law scholar would suggest that this nascent right established by a slim 5–4 majority is now somehow "well-established." This author would argue that not only is the right not well-established, it is equally not well-supported in history or law.

<sup>232</sup> *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008). However, as articulated in *Heller*:

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. Justice Breyer's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right's codification; it was the *central component* of the right itself.

*Id.* at 599.

<sup>233</sup> See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) ("In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." (citation omitted)).

Constitution: the Article V Amendment process.<sup>234</sup> The time has come for us to amend the Second Amendment to ensure that lawful gun owners do not see their rights proscribed, or constricted, by a slim majority of Supreme Court Justices.

## V. THE TIME HAS COME TO REPLACE 27 WITH 28

“The most universal and effectual way of discovering the true meaning of a law [is to inquire into] the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it.”<sup>235</sup> Much like Jonathon Swift before me, though lacking his literary grace, I feel compelled to put forth a modest proposal to amend the Second Amendment so as to strengthen its presumed protections.<sup>236</sup> Before opposing this novel approach, I would suggest that perhaps the proposal is neither as desperate nor as aspirational as it seems. Article V permits the best solution for our Second Amendment dilemma—a dilemma that is crippling our legislators, clogging our courts, hamstringing our cities, and making it increasingly difficult for lawful gun owners to securely assert their individual rights. Article V permits us to amend the Second Amendment to replace it with something much more applicable to our modern times. Rather than stray willfully, or ignorantly, from the Founders’ Second Amendment, it is time to stand up and call for real change, real substance, and meaningful action. It is time to replace the Second Amendment’s twenty-seven words with a new and improved Twenty-Eighth Amendment that focuses on the right of law-abiding citizens to retain their guns free from unnecessary governmental intrusion or interference.

I hereby propose that the Second Amendment be amended in the following manner:

**PROPOSAL:** Twenty-Eighth Amendment to the United States Constitution

Sec. 1: The Second Amendment to the Constitution of the United States is hereby replaced immediately with this new

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<sup>234</sup> See *supra* note 5 (discussing the Article V amendment process).

<sup>235</sup> Cornell, *supra* note 99, at 576 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 60 (George Sharswood ed., 1895)) (internal quotation marks omitted).

<sup>236</sup> See generally JONATHAN SWIFT, A MODEST PROPOSAL (1729) (proposing a solution “for preventing the children of poor people in Ireland[] from being a burden to their parents or county, and for making them beneficial to the publick” by selling a large portion of its children to be consumed as food).

### Amendment.<sup>237</sup>

Sec. 2: Congress shall make no law regulating or otherwise restricting the use, ownership or transfer of guns and weaponry.<sup>238</sup> Congress retains, however, the sole power to regulate and restrict all weaponry intended for military use, including tanks, drones, bombs, and fully automatic guns and weaponry.<sup>239</sup> No such restriction or regulation may be made on the basis of race, sex, national origin, or religious heritage.<sup>240</sup>

Sec. 3: Existing federal gun control laws regulating felons in possession or persons under indictment for domestic violence are not affected by this Amendment. Such existing laws remain valid, but no new regulations may be initiated at the federal level except as provided in Section 2 of this Amendment.

Sec. 4: Each State has the power to regulate or restrict the use, ownership, and transfer of all non-military style weaponry, including all semi-automatic guns, within its borders.<sup>241</sup> No such restriction or regulation may be made on

<sup>237</sup> This is the same formula used in the Twenty-First Amendment when the Eighteenth Amendment was repealed and replaced. I would recommend following the same, though admittedly remarkable, precedent. See U.S. CONST. amend. XXI, § 1.

<sup>238</sup> This Congressional exemption relating to weaponry is similar to the Commerce Clause exemption granted to the states for alcohol regulation, an Article otherwise subject to interstate commerce regulation, under the Twenty-First Amendment. See *id.* § 2.

<sup>239</sup> This provision ensures that only the federal government would have the power or authority to possess certain military weapons that were never intended to be in private hands. In some measure, this provision comports with existing Second Amendment case law—at least case law relating to the Founders' Second Amendment—that military weaponry can be removed from pure individual pursuits and remain connected to the civic role of military/militia service. See, e.g., *Nordyke v. King*, 319 F.3d 1185, 1191 (9th Cir. 2003) (holding that the Second Amendment is a “collective right” for states to maintain a militia and not a “protection for the individual’s right to bear arms”); *Silveira v. Lockyer*, 312 F.3d 1052, 1087 (2002), *abrogated by* *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010) (holding that California could regulate or prohibit assault weapons). The provision may prove controversial, however, as this section places solely in Congress’s jurisdiction the power to regulate, or even proscribe, military-style high capacity guns.

<sup>240</sup> This provision, coupled with the Fourteenth Amendment, should prevent any return to the Black Codes or days when Native Americans were denied access to guns in order to further the then existing white social order. See Cottrol & Diamond, *supra* note 39, at 323–27 (discussing the colonial American history of white settlers arming themselves to maintain control over slaves and to protect against attacks from Native Americans).

<sup>241</sup> This approach merely returns us to the period prior to *McDonald*, when individual states were permitted to regulate, and even restrict, certain weaponry. Admittedly, this provision is far broader than the post-*Heller* and *McDonald* opinions, as this provision would permit a complete ban on non-military weaponry, even for self-defense purposes. This section allows each state to determine for itself what rights and regulations, if any, should exist in relation to weaponry.

the basis of race, sex, national origin, or religious heritage.<sup>242</sup>

Sec. 5: This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by Congress.<sup>243</sup>

Many who read this proposal will respond viscerally contending that such option is outrageous or unnecessary. Such reflexive reaction is short-sighted and fails to appreciate the dangers of continuing to rely upon an unelected Supreme Court for periodic direction on gun rights. Those who claim an individual "right" in the constitutional sense to keep and use a gun for hunting, self-defense, or other purposes, will not likely want to evaluate a new approach to gun rights. Why should they? The current Supreme Court appears likely to continue giving some, still unclear, protection to gun owners and gun rights. But, the Court's composition is bound to change, and soon. The problem with relying on the fluid dynamics of the Supreme Court is that today's majority can quickly become tomorrow's dissent. The Court's balance of ideological power appears split 5 to 4. This is a fragile and vulnerable majority. Thus, any change in membership could return our country to the Second Amendment's previous interpretation consistently advanced until *Heller* and *McDonald*. The age of several of the Justices suggests retirements could be eminent.

The Founders recognized that in order for their Constitution to survive generations, an adaptive, modernizing tool was necessary. Article V, the Amendment process, was provided to deal with changing conditions like those facing the Second Amendment. No longer is the focus a militia that needs to be poised to protect us. No longer do we fear a standing army as the threat to our liberty and security, but rather, we celebrate the world's greatest military and its ability to protect our many freedoms. While many still understandably fear tyranny or the threat that government tyranny could compromise our liberties, another threat is the uncertain precedent regarding guns. Regulations will continue to plague lawful gun owners. And, calls for limits to the number of concealed carry licenses, open carry

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<sup>242</sup> This provision, which is identical to that provided in Section 2 of this proposed amendment, see *supra* text accompanying note 240, ensures that there shall be no return to the Black Codes or days where Native Americans were denied access to guns in order to further the then existing white social order. See *supra* notes 39–40 and accompanying text.

<sup>243</sup> This is the identical language pulled from the Twenty-First Amendment. U.S. CONST. amend. XXI, § 3. While this author does not prefer one method of ratification over another as provided by Article V, the language selected for this proposal comes directly from the only other Amendment that both repealed and replaced another Amendment. See U.S. CONST. art. V (discussing the two methods of ratifying an amendment).

opposition, background checks and other restrictive laws will continue to proliferate. Our Second Amendment rights are currently in the hands of a very divided Supreme Court.

The Second Amendment, as currently written, no longer provides adequate protection to lawful gun owners. Rather than completely abandon our Constitution, we have the ability to restructure these protections in a manner more likely to protect our modern lives and our law-abiding citizens. Or we can continue to rely on the Supreme Court and its vacillating membership to expound and modernize the Constitution, always hoping that the Justices sharing our ideological viewpoint remain in the majority. *Heller* and *McDonald* are literally a single judicial appointment away from reversal.

The more predictable approach, Article V's constitutional amendment process, is also the more difficult path. The Founders wanted the Constitution to be difficult to alter and, thus, ensured that any amendment would need to receive massive legislative and state support.<sup>244</sup> That is not to say that this solution is impossible or ill-conceived. This author wholeheartedly believes that the time has come to modernize protection for our gun rights, both collectively and individually, in a meaningful manner. Let us return the "right" to the states to implement their traditional police power to keep their citizenry safe. Let us return to direct democracy. Much like capital punishment, gay marriage, and other controversial topics, the better approach may be to return the power of regulation to the states—the precise location the Founders would have, and did, approve.

An Article V amendment is distinct from calling a full-fledged Article V convention, something this author currently opposes,<sup>245</sup> but an option that Second Amendment scholars like Glenn T. Reynolds and Sanford Levinson welcome for other potential amendments.<sup>246</sup> No doubt about it, an Article V amendment (in the singular) would be revolutionary. Few amendments have occurred outside the founding amendments and the Civil War amendments.<sup>247</sup> The time has come to once again amend our

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<sup>244</sup> U.S. CONST. art. V.

<sup>245</sup> See generally Mary Margaret Penrose, *Conventional Wisdom: Acknowledging Uncertainty in the Unknown*, 78 TENN. L. REV. 789 (2011) (presenting the uncertainties surrounding the process of the untested Article V state convention process).

<sup>246</sup> See Sanford Levinson, *Afterword: Full of Sound and Fury but Signifying Relatively Little?*, 78 TENN. L. REV. 867, 869 (2011) ("One might agree that explicit 'amendatory adaptation' is better than 'amendment by latitudinarian interpretation,' but . . . a significant deficiency of the United States Constitution is that it is quite literally the most difficult to amend constitution in the entire world."); Glenn Harlan Reynolds, *Foreword: Divine Operating System?*, 78 TENN. L. REV. 651, 653 (2011) ("[T]he Constitution has been effectively amended by judicial interpretations on numerous occasions . . . . If the Republic can face the risks of amendment via judicial action with equanimity, it can surely face the risks inherent in amendment via the procedures of Article V.").

<sup>247</sup> See Timothy Lynch, *Amending Article V to Make the Constitutional Amendment Process Itself Less Onerous*, 78 TENN. L. REV. 823, 824 (2011) ("Over the past 224 years, the Constitution has been



Constitution. The time has come to take twenty-seven words and turn them in to the Twenty-Eighth Amendment.

## VI. CONCLUDING THOUGHTS: AN IDEA THAT HAS OUTLIVED ITS USEFULNESS

"The text of the Second Amendment is maddeningly ambiguous."<sup>248</sup> Americans are a curious lot. We remain profoundly inconsistent in our support of an eighteenth-century Constitution that many criticize as outdated and incapable of responding to our modern needs such as abortion, gay marriage, and other issues.<sup>249</sup> And, yet, we criticize the interpretation of this Constitution when federal courts, often including our Supreme Court, act to either find, or define, an individual right, such as the current trend of federal courts sanctioning same-sex marriage, that is at clear odds with state legislative pronouncements. Under the status quo, we rely on an unelected Supreme Court to continually breathe life into this document, always remembering it is a Constitution they are expounding.<sup>250</sup> And many who criticize the Court speak of it as an activist body—a group of politically appointed judges that serve life terms often in anonymity. But, why wait for the Supreme Court to expound when we have the power to improve?<sup>251</sup> Why rely on nine voices when we can include the voices of millions? The Founders provided us a viable solution in Article V—a solution we have used to give us the Fourteenth Amendment, among others.

All would hopefully admit that we will never be able to discern, with finality or confidence, what the Founders truly meant when crafting this singularly eternal document. So why is it so difficult to envision a new Second Amendment, one that considers a world where blacks can never again be slaves, where Indians hold citizenship, and where women have rights outside the home and marriage? Why do Americans fear abandoning this archaic Second Amendment in hopes of securing the elusive meanings of yesterday when we should be focusing on the

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amended seventeen times."). The Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—were ratified in 1865, 1868, and 1870, respectively. *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, <http://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> (last visited Apr. 15, 2014).

<sup>248</sup> Winkler, *supra* note 90.

<sup>249</sup> See, e.g., Louis Michael Seidman, Op-Ed., *Let's Give Up on the Constitution*, N.Y. TIMES, Dec. 31, 2012, at A19 (arguing that Americans' "insisten[t] . . . obedience to the Constitution" is the "culprit" causing American political dysfunction).

<sup>250</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is a constitution we are expounding.").

<sup>251</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."). Article V, if properly utilized, will help delimit the expounding needed by our ever-changing Supreme Court.

certainties of individual rights for law-abiding gun owners that exist and deserve protecting today? The truth is that our Second Amendment is still vulnerable to judicial review and restriction. The Founders could never have envisioned the world we live in and our modern conveniences, ranging from travel to communication to weaponry. The political discourse was limited to the Federalist Papers and pamphlets while ours is expanded by *Facebook*, *Twitter*, *Instagram*, and 24-hour news media. Their Second Amendment is not suited for drones, M-4s, and nuclear arms any more than our defense is dependent upon militias, muskets, and flintlocks.

The Founders lived in a world without a professional police force and without the nation's strongest army literally deployed throughout the world. The Founders had slaves and plantations. Modern Americans have email, DVRs, and unparalleled amenities. Our worlds are so distinct that their concerns cannot possibly be our concerns. The fears that motivated the Founders, such as the fear of a standing army, give modern Americans comfort and pride as we support our troops stationed across the globe. We are much more than distant cousins; we are literally worlds apart.

The time has come; in fact the time has passed, to reevaluate the Second Amendment and its applicability to the modern world. We need a new, predictable way to protect the rights of law-abiding individuals to own and use guns.

This author believes that we should consider using Article V to reformulate the Founders' Second Amendment into a more workable modern amendment unquestionably securing the rights of lawful gun owners. This author further believes that this amendment process should take place through the Article V process, firmly placed in the state legislative bodies rather than the continued refinement of gun rights, and other individual rights "expounded" through judicial review.

The time has come to consider using the Article V process to replace the Second Amendment with a states' rights approach. The proposal seeks to enhance, rather than limit, law-abiding citizens' rights to continue to own and use guns for hunting and self-protection. The proposal is most decidedly individual and states' rights focused. At its core, this proposal considers who is best suited to determine what regulations, if any, should be applied to lawful gun ownership. Should that power be placed with the state or federal government? This author has less confidence in the Supreme Court than in the individual state legislatures. Based on this belief, it is time to draft a modern Second Amendment that completely removes any notation to the militia and returns the power of regulation to the individual states. Only in this way can we be confident that lawful gun ownership will remain a viable individual right in this country.

